Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

RICHARD F. RICHENBERG, JR.,

Petitioner,

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE, AND SHEILA WIDNALL, SECRETARY OF THE DEPARTMENT OF THE AIR FORCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS C. KAYSER
Counsel of Record
RANDALL TIETJEN
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500

Attorneys for Petitioner

April 15, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. On its face or as applied, does the federal government's "Don't Ask, Don't Tell" policy on military service by homosexuals – which expressly allows homosexuals to serve in the military but subjects them to discharge if they *tell* anyone that they are homosexual – constitute an impermissibly overbroad and content-based restriction on speech in violation of the First Amendment?

2. On its face or as applied, does the "Don't Ask, Don't Tell" policy – which purports to further the military's interest of "unit cohesion" by discharging service members who state that they are homosexual but which actually sanctions government discrimination and bigotry – violate the equal-protection guarantee of the Fifth Amendment?

3. On its face or as applied, does the "Don't Ask, Don't Tell" policy impose an irrebuttable presumption of misconduct against homosexual service members who disclose their sexual orientation, in violation of the due-process guarantee of the Fifth Amendment and the Administrative Procedure Act ("APA")?

4. By retroactively applying the "Don't Ask, Don't Tell" policy in this case, has the government violated the Bill-of-Attainder Clause or the APA?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Richard F. Richenberg, Jr., respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1-22) is reported at 97 F.3d 256. The opinion of the United States District Court for the District of Nebraska (App. 24-51) is reported at 909 F. Supp. 1303. The findings and recommendation of the Board of Inquiry (App. 59-61) and the final decision of Respondent Widnall (App. 52) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on 3 October 1996. The court of appeals – in a tie vote, five-to-five – denied the Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* on 17 January 1997. (App. 62) The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment: "Congress shall make no law . . . abridging the freedom of speech. . . . " *United States Constitution, Fifth Amendment*: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . " *United States Constitution, Article One, Section 9, Clause 3*: "No Bill of Attainder or ex post facto Law shall be passed." *Administrative Procedure Act ("APA") (5 U.S.C. § 706)*: (App. 63-64). *Section 571 of the National Defense Authorization Act of 1994 (10 U.S.C. § 654)*: (App. 65-71). *Department of Defense ("DoD") Directive No. 1332.30*: (App. 72-106).

STATEMENT OF THE CASE

This case involves a dedicated and highly decorated Air Force officer, whose ten years of military service, including twenty-five combat missions during Desert Shield and Desert Storm, were nothing but exemplary. At issue is whether the federal government can constitutionally remove him from military service – under the federal statute and regulations popularly known as the "Don't Ask, Don't Tell" policy – simply because he advised his commander that he is gay.

I. The "Don't Ask, Don't Tell" Policy.

The Act. On 30 November 1993, Congress enacted the National Defense Authorization Act of 1994. Section 571 of this Act, entitled "Policy Concerning Homosexuality in the Armed Forces," codified what is popularly

known as the "Don't Ask, Don't Tell" policy for the military. 10 U.S.C. § 654 ("the Act") (App. 65-71). The Act purports to establish a policy that mere homosexual orientation, by itself, is not incompatible with military service. *Id.* at § 654(b)-(c) (App. 67-69). A person's statement that he or she is a homosexual, however, *is* sufficient ground, without anything more, for discharge. *Id.* at § 654(b)(2) (App. 68).

Separation from the military is required if a service member has merely stated that he or she is homosexual "unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* (App. 68). The Act does not define "propensity" or "intends" nor does it say what evidence or what level of showing might suffice to rebut this presumption. The Act does define a "homosexual act" in two subparagraphs: (A) "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires" or (B) "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." *Id.* at 654(f)(3) (App. 70).

Congress included several express findings in the Act. These findings include a vague reference to the presumed adverse reaction that might be engendered among some heterosexuals if it were disclosed or communicated that another service member is a homosexual:

"The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." *Id.* at § 654(a)(15) (App. 67).

The Regulations. On 21 December 1993, the Secretary of Defense issued a number of directives implementing and giving effect to the Act. These include a reissued Directive 1332.30, entitled "Separation of Regular Commissioned Officers," which took effect on 28 February 1994. DoD Dir. 1332.30 (App. 72-106).[1] The regulations issued by the Secretary do not regard sexual orientation as a basis for disqualification from the military. Directive 1332.30 explicitly states that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct." DoD Dir. 1332.30 Enc. 2 [2-1] ¶ C (App. 81-82).

Directive 1332.30 defines "homosexual conduct" as including not only "homosexual acts" but also "a statement by a member that demonstrates a propensity or

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[1] At the same time that Directive 1332.30 was issued the DoD also issued Directive No. 1332.14, which governs the separation of enlisted personnel. These two Directives are identical in all material respects. In February 1994, after these new directives were issued, the Department of the Air Force amended Air Force Regulation 36-2, entitlèd "Officer Personnel, Administrative Discharge Procedures." This amendment brought AFR 36-2 into conformity with Directive 1332.30 and repeats the information, procedures, and definitions contained in that document.

intent to engage in homosexual acts." DoD Dir. 1332.30 Enc. 2 [2-1] ¶ C (App. 81). The simple statement "I am gay," in other words, constitutes "homosexual conduct." Any such statement – under Directive 1332.30, just like under the Act – "creates a rebuttable presumption" that the member "engages in homosexual acts or has a propensity or intent to do so." DoD Dir. 1332.30 Enc. 2 [2-2] ¶ b (App. 83). Directive 1332.30 does not distinguish "propensity" from "intent" but defines "propensity" as something "more than an abstract preference or desire to engage in homosexual acts" and that "indicates a likelihood that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 Enc. 1 [1-1] ¶ 13 (App. 79).

In determining whether an officer has successfully rebutted the presumption that the officer engages in or has a propensity or intent to engage in homosexual acts, Directive 1332.30 requires that the following nonexclusive factors be considered: (1) "[w]hether the officer has engaged in homosexual acts"; (2) "[t]he officer's credibility"; (3)"[t]estimony from others about the officer's past conduct, character and credibility"; (4)"[t]he nature and circumstances of the officer's statement"; (5) "[a]ny other evidence relevant to whether the officer is likely to engage in homosexual acts." DoD Dir. 1332.30 Enc. 2 [2-2] 1b(1)-(5) (App. 83-84). (All of these factors favored a finding that Richenberg had rebutted the presumption).

II. Events Leading to Discharge.

In April 1993, petitioner Richenberg submitted a separation request to the Air Force asking that he be allowed

to leave the military. (Pet. COA App. 18, 39). He submitted this request because he had come to realize a few months earlier that he is gay, and he knew that under the regulations then in effect he could be forced out of the service with a less-than-honorable discharge if his sexual orientation became known. (Pet. COA App. 18). His request was denied. The Air Force explained that his resignation was "not considered to be in the best interests of the Air Force." (Pet. COA App. 18, 32-33).

Following the denial of this request to separate, Richenberg became determined to stay in the Air Force but as a matter of principle and personal integrity he decided that he had to tell his commanding officer that he is gay. At the time of his request to separate and his decision to inform his commanding officer of his sexual orientation, Richenberg was in Texas training for an assignment in Saudi Arabia. (Pet. COA App. 18-19). He decided to inform his commander by sending him a letter. This letter explained that "[t]his ha[d] been a year of extraordinary personal growth for [him] and, after much soul searching," he had "accepted the fact that [he is a] homosexual." (Pet. COA App. 33, 42-43). Around this same time, Richenberg also privately told two friends and fellow officers that he is gay. (Pet. COA App. 18-19).

III. Administrative Proceedings.

First Board of Inquiry (December 1993). As a consequence of Richenberg's letter and his statements to his

friends – and nothing more – the Air Force began proceedings to discharge him.[2] These proceedings included convening a three-member administrative board of inquiry ("BOI"). A hearing was held before this board and, on 2 December 1993, the board recommended that Richenberg be discharged, pursuant to the now superseded version of Air Force Regulation 36-2. (Pet. COA App. 19). On 30 November 1993, a few days before the board's recommendation, Congress passed the Act. As a consequence of this new law and the regulations that shortly followed, the Air Force decided to reprocess Richenberg for discharge, applying the new federal "Don't Ask, Don't Tell" policy retroactively to his statement.

Second Board of Inquiry (June 1994). A second three-member board of inquiry was convened in June 1994. During this BOI proceeding, Richenberg testified, under oath and subject to cross-examination, that when

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[2] In addition to immediate discharge proceedings, Richenberg's superior officers took several steps to derail Richenberg's career, including: revoking his security clearance so that he would no longer have access to equipment, materials, and information used by other Electronic Warfare Officers (like Richenberg) to improve and maintain their skills; revoking his flight status so that he could no longer fly; and, assigning him to an administrative desk job. In addition to these actions, Richenberg's superior officers immediately began to evaluate his performance negatively. After more than eight years of excellent evaluations, Richenberg's commanding officers filed two negative Officer Performance Reports. During the administrative board proceedings, Richenberg's commanding officer admitted that the only reason for rating Richenberg negatively was because he had stated that he is gay. (Pet. COA App. 227-39).

he stated to his commanding officer that he is gay, he did not intend to engage in prohibited conduct.[3]

He also testified that he did not intend to engage in prohibited conduct at any time in the future:

> Finally, I would like to make clear in no uncertain terms that my statement of my orientation was exactly that, a statement. It was a statement of my mind and not of my body. It was not a declaration that I had any intentions of doing anything that I said that I would not do. I did not then intend to engage in prohibited conduct, I do not now intend to engage in prohibited conduct, nor do I, in the future, intend to engage in prohibited conduct.

(Pet. COA App. 297). Following this statement, Richenberg was cross-examined extensively by the Air Force's Recorder, during which Richenberg gave no basis to doubt his sincerity or credibility. (Pet. COA App.

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[3] By making a sworn statement under oath (which Richenberg had not done in the first BOI proceedings), Richenberg allowed the Air Force a complete opportunity to attack his evidence. Richenberg could have made no statement at all or made an oral or written unsworn statement, in either of which case he would not have been subject to cross examination. *See* (Pet. COA App. 534 (AF Reg. 36-2, 7-3h), 599 (AF Inst. 36-3206, 7.3.7)). In this important sense, the facts of this case differ from the facts of *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc) *cert. denied*, 117 S. Ct. 358 (1996). In *Thomasson*, the service member did not make a statement regarding whether he did or did not intend to engage in homosexual conduct; he made only an unsworn statement that he is a gay man, on which the government could not cross examine him. *See Thomasson v. Perry*, 895 F. Supp. 820, 830 (E.D. Va. 1995).

297-308). During these proceedings, Richenberg submitted extensive evidence of his impeccable record and four officers, all members of his squadron, testified that Richenberg's presence in their military unit had no negative effect on morale or cohesion and that they would all be willing, without problem or objection, to work with and fly with him. Each officer testified that he was proud to serve with Richenberg and stated that Richenberg is a man of his word and that his integrity and honesty are unquestionable. (Pet. COA App. 249-94). The Air Force submitted *no* evidence during the proceedings of any improper or homosexual conduct by Richenberg.

On 21 June 1994, after approximately an hour of deliberation, the board recommended that Richenberg be discharged. (App. 59-61). The board found that Richenberg had made three statements that he is gay – in the letter to his commanding officer and to his friends and fellow officers. The board concluded, without any further explanation or findings, that Richenberg therefore has "a propensity to engage in or intent to engage in homosexual acts." (App. 60).

Post-Board Proceedings. Following the second BOI, an Air Force Board of Review accepted the findings of the BOI and recommended that Richenberg be discharged. (App. 57). On 28 August 1995, the Secretary of the Air Force, following the recommendation of the Deputy for Air Force Review Boards (App. 53-56), issued an order to discharge Richenberg. (App. 52).

IV. The District Court.

On 31 August 1995, Richenberg commenced this action in the district court for Nebraska seeking, among other relief, a declaration that the policy, on its face and as applied, is unconstitutional and that his discharge violated the APA. At the same time, Richenberg brought a motion for immediate injunctive relief to prevent the Air Force from discharging him. The district court granted the motion and required the parties to submit expedited cross motions for summary judgment. Richenberg's motion to compel discovery of documents and other information before the cross motions were heard was denied. On 11 December 1995, the district court granted summary judgment for the respondents on all claims. (App. 23-51).

In its Memorandum Opinion, the district court acknowledged "that there certainly is prejudice against homosexuals" in the military but concluded that "the Court is called upon to determine the constitutionality of the policy – not its wisdom." (App. 40). The court then applied an extreme form of deference to Congress and the military by declining to scrutinize the record or examine, in any depth, the government's purported justifications for the policy at issue.

The district court rejected Richenberg's claim that the policy on its face and as applied violates the First Amendment. The court acknowledged that "[t]here is little doubt that the policy affects speech" but maintained that "[t]he only restriction on [Richenberg's] speech is the ability to state that he is homosexual." (App. 36). The district court stated that although "this may result in a

denial of self-identity, [Richenberg's] interests in autonomy and self-identity are subordinate to the military interests in good order and discipline, morale, unit cohesion and combat readiness." (App. 36). The district court gave no express consideration to the substantial record that supports Richenberg's contention that the legislative history and operative effects of the policy reveal that the actual objective of the policy is to inhibit service members from telling anyone that they are gay. The purpose of this policy objective is to guard against the negative reaction that might be engendered if anyone expressly discloses that he or she is homosexual.

The district court also rejected Richenberg's equal-protection claim. Applying a rational-basis review and rejecting Richenberg's claim that the policy is based on an inherently suspect classification (i.e., sexual orientation), the court held that the government has a legitimate interest in banning persons who have a "propensity" to engage in homosexual conduct because Congress has determined that ."the presence of persons who demonstrate a propensity to engage in homosexual conduct presents an unacceptable risk to unit cohesion, morale, good order and discipline and military readiness." (App. 40). The court concluded that "the military may rationally and reasonably infer from a statement of homosexuality that a member has a propensity to engage in homosexual conduct." (App. 41).

The court did not address the fact that the new policy of the military expressly *allows* undeclared homosexuals to serve in the military nor did the district court explain how any rational distinction on "propensity" grounds can be drawn between the treatment of undeclared and

declared homosexuals. The district court also rejected Richenberg's due process, bill-of-attainder, and APA claims. (App. 44-51). On 19 December 1995, the district court denied Richenberg's motion for an injunction pending appeal and Richenberg, the same day, filed a notice of appeal and a motion with the court of appeals for an injunction pending appeal.

V. The Court of Appeals.

On 26 December 1995, a divided panel of the court of appeals denied the motion for an injunction pending appeal. Shortly thereafter the Air Force discharged Richenberg. On 8 April 1996, the court of appeals heard oral arguments on the merits of Richenberg's appeal. On 3 October 1996, a divided panel of the court of appeals affirmed the judgment of the district court. (App. 1-22).

The Panel Majority. Judge Loken wrote the majority opinion for the panel and rejected Richenberg's equal-protection argument, applying a rational-basis review (like the district court). In its analysis, the panel majority repeated an overarching (and erroneous) theme that would run throughout the entire opinion. The court asserted that the policy at issue does not "target mere status or speech" and that the discharge of Richenberg was not solely on the basis of his speech or his status as a declared homosexual. (App. 10, 14). The panel majority maintained that the policy is only directed at service members who "commit, attempt to commit, intend to commit, or have a propensity to commit unacceptable sexual *acts*." (App. 10 (emphasis in original)).

The panel majority made no attempt to try to explain how – if the policy does not "target mere status or speech" – the policy can rationally draws a distinction between undeclared homosexuals (who are allowed to serve) and declared homosexuals (who are presumed to commit unacceptable sexual acts). Like the district court, the court of appeals accepted the "unit cohesion" argument of the government as a legitimate objective. (App. 11-12). Also like the district court, the appellate court declined – despite the extensive and contrary congressional record – to examine in any depth whether the actual objective behind the policy was to cater to hate and prejudice that some service members might feel toward homosexuals.

The panel majority briefly dismissed Richenberg's First Amendment challenge as "without merit" on the ground that the First Amendment is not implicated by Richenberg's discharge. (App. 14). According to the panel majority, Richenberg's statement that he is gay was only used as "evidence" that he has a "propensity" to engage in prohibited sexual acts. (App. 14). The panel majority stated that the First Amendment " 'does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.' " (App. 14 (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)). The panel majority gave no express consideration to the obvious fact that the human trait revealed by the statement "I am gay" is not supposed to disqualify a person from service under the new policy.

Finally, like the district court, the panel majority also rejected Richenberg's due process, bill-of-attainder, and APA claims. On the due process claim, the panel majority

held that the presumption of sexual misconduct that was applied to Richenberg was neither impermissible nor irrebuttable. (App. 13-14). The court of appeals said essentially nothing about the bill-of-attainder claim and the fact that the policy had been applied retroactively to Richenberg. (App. 17). On the APA claim, the panel majority held that the policy was properly applied to Richenberg. (App. 15-17).

The Panel Dissent. Chief Judge Arnold dissented from the panel majority's opinion. He explained that the new statute supporting the military's policy "blurs the line between status and conduct by making a servicemember's admission that he or she is a homosexual sufficient grounds for presuming that the servicemember is likely to or intends to engage in prohibited conduct." (App. 17-18). After reviewing the record, the dissent explained that all of the evidence supported a finding that Richenberg *had* rebutted the presumption and none of the evidence seem to support the BOI's decision recommending discharge.

Chief Judge Arnold explained that Richenberg swore under oath at his hearing that he had no intention of acting on his homosexual orientation and "that he was 'very capable' of abstaining from prohibited conduct." (App. 19). The record, as Chief Judge Arnold explained, "presents many reasons to believe him and insufficient reason to doubt him." (App. 19). Richenberg, by all accounts, was "an outstanding Air Force officer," whose performance reports "are full of praise for his professionalism, dedication, and leadership abilities, and he received many medals over the course of his Air Force career." (App. 19-20). Richenberg also "flew 25 combat

missions in Operation Desert Storm." (App. 19). Furthermore four fellow officers attested at the BOI hearing to Richenberg's "honesty, integrity, and discipline, as well as to his dedication and loyalty to the Air Force." (App. 20).

The government, as the dissent explained, introduced no evidence that called any of the testimony in Richenberg's favor into question and the BOI did not explain why it found that Richenberg "had filed to rebut the presumption." (App. 20). Chief Judge Arnold explained that Richenberg's admission under cross-examination "that he was physically attracted to men" "adds nothing to his admission of homosexuality" and "[w]ere it enough to justify the Board's finding, the presumption would be effectively irrebuttable and, therefore, unconstitutional." (App. 21). In the end, Chief Judge Arnold would have reversed the judgment of the district court and remanded with directions to grant Richenberg's motion for summary judgment or, in the alternative, remanded the case to the district court with instructions for remand to the Board of Inquiry for an explanation of its decision to discharge Richenberg. (App. 21-22).

On 17 January 1997 the panel denied Richenberg's petition for rehearing and an evenly divided full court – on a five-to-five vote – refused Richenberg's suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

This case presents constitutional issues of exceptional importance. Under the new policy, the government no longer disputes that homosexuality is *not* inherently

incompatible with military service. The government justifies its policy of discharging service members who state that they are gay on the ground that other service members will be upset and disruptive if they know that a service member is gay. This justification is by its terms based on irrational prejudice, and the constitution does not cater to prejudice. Richenberg maintains that his discharge and the retroactive application of the "Don't Ask, Don't Tell" policy violate the constitutional guarantee to equal protection of the laws, freedom of speech, due process, and the Bill-of-Attainder Clause. Chief Judge Arnold correctly labeled the issues raised as "large constitutional questions." (App. 22).

This case is one of several involving the "Don't Ask, Don't Tell" policy that are cropping up all over the country. The lower courts, including in cases under the former military policy, are reaching conflicting results. The divided court in this case – on the merits by the panel and on the vote of the full court for rehearing en banc – is reflective of the continuing division in the lower courts. This Court should grant this petition to definitively settle the constitutional issues faced by and dividing the lower courts.

I. This Case Raises Questions of Fundamental Importance and the Decision of the Panel Majority of the Court of Appeals Is Erroneous.

1. This Court has long recognized that a government policy that is based on invidious or irrational prejudice cannot serve a legitimate governmental purpose. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court explained:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Id. at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J. dissenting); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985). The decision upholding the discharge of Richenberg *cannot* be harmonized with this principle. Richenberg is not asking the courts – as the district court implied – to determine the "wisdom" of the policy. Richenberg is only asking the courts to determine its constitutionality.[4]

This Court recently had its first occasion to apply this principle in the context of a law that discriminates on the basis of sexual orientation. In *Romer v. Evans*, 116 S. Ct. 1620 (1996) (which the panel majority only mentioned in passing (App. 9)), the Court held unconstitutional a state constitutional amendment that "raise[d] the inevitable inference that the disadvantage imposed [by the law was] born of animosity toward the class of persons affected [i.e., gays and lesbians]." *Id.* at 1628. The Court observed that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least

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[4] On Richenberg's equal-protection claim (and bill-of-attainder claim), no deference is due the government because this case involves the military. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), this Court explained that "a different equal protection test" does *not* apply simply because a case arises in "the military context." *Id.* at 71.

mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id.* (emphasis in original) (quoting *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Here, the legislative history and operative effects of the policy expose that the real objective of the "Don't Ask, Don't Tell" policy is to inhibit service members from telling anyone that they are gay and to guard against the negative reaction that might be engendered if anyone expressly discloses that he or she is homosexual. Indeed, "[t]he sole motivation for the exclusion of acknowledged homosexuals from military service is prejudice." *Cammermeyer v. Aspin*, 850 F. Supp. 910, 924 (W.D. Wash. 1994), *dismissed and remanded*, 97 F.3d 1235 (9th Cir. 1996).[5] Capt. Richenberg presented a great deal of evidence of this objective in his brief, including references to several parts of the legislative record.[6] *See also, e.g., Thomasson v. Perry,*

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[5] Several lower courts have noted the striking similarities between the rationales used against homosexuals and the military's former resistance to racial desegregation. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (en banc) (Watkins, J., concurring), *cert. denied*, 498 U.S. 957 (1990); *Able v. United States*, 880 F. Supp. 968, 978 – 79 (E.D.N.Y. 1995), *aff'd in part, rev'd in part, and remanded*, 88 F.3d 1280 (2d Cir. 1996); *Cammermeyer*, 850 F. Supp. at 923.

[6] *See, e.g.*, Pet. COA App. 747 (Senate Hearings; Sen. Lott stating that the issue before Congress was whether or not to "allow[ ] homosexuals and lesbians to openly serve"); Pet. COA App. 752 (Senate Hearings; Com. Pledger testifying: "I do not think there is any physical or mental or any other difference in their capabilities compared with the heterosexual. But as we have been talking about all day, it is the attitudes of the majority

80 F.3d 915, (4th Cir. 1996) ("The evidence that prejudice against homosexuals is a purpose of "don't ask, don't tell" is . . . quite strong.") (Hall, J., dissenting). The district court found "that there certainly is prejudice against homosexuals" in the military (App. 40) but then – together with the appellate court – gave effect to that prejudice.

2. In addition to the illegitimate objective of the policy, the policy also operates in an irrational and discriminatory manner. The new policy, as explained above, expressly allows homosexuals to serve in the military. But if a service member tells someone that he or she is gay, the policy presumes that the service member has a "propensity" to engage in homosexual acts. This distinction between declared and undeclared homosexuals is utterly irrational, and the panel majority did not discuss it. The panel majority simply concluded that "it is rational to assume that both homosexuals and heterosexuals 'are likely to act in accordance with their sexual drives.' "

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of the heterosexuals and the reactions" that creates the problem); Pet. COA App. 753 (Senate Hearings; Capt. Wolf testifying that with "someone who is not only homosexual but is openly homosexual . . . the members of the Marine Corps . . . abhor that lifestyle, or simply will not accept that person as a member of a team").

In their briefs below, the government has generally refused to acknowledge that the policy at issue caters to prejudice, but outside the courts, the government is willing to make this admission. The very government lawyer who defended this case below was recently reported as saying that "the gay ban is based on possible 'reactions from other people,' who may be bothered by the presence of homosexuals among them." Nick Adde, "Maybe Courts Can't Settle the Gay Issue," *Air Force Times*, 14 April 1997 at 8 (quoting Department of Justice attorney, Anthony Steinmeyer).

(App. 12). This misses the point entirely, and says nothing about why declared homosexuals are presumed to have a "propensity" and undeclared homosexuals do not.

The irrational effects of the policy are especially made apparent by reading the policy in its entirety. The regulations expressly allow service members to frequent "gay bar[s]," to possess or read "homosexual publications," to associate "with known homosexuals," and to "march[ ] in gay rights rall[ies]." DoD Dir. 1332.30 Enc. 8 [8-2] ¶ C3d (App. 104). What the new policy will simply *not* allow, is for a service member to *tell* someone that he or she is gay. If a service member says "I am gay," that statement by itself becomes a basis for discharge. How is it rational to allow gay service members to engage in all of these activities yet discharge them if they tell anyone that they are gay? The fact that service members are expressly allowed do all of these things but are not allowed to tell anyone that they are gay demonstrates not only that the policy is irrational but also that the policy is designed to suppress speech and to discriminate against homosexuals who happen or dare to tell someone their sexual orientation.

3. In addition to violating the equal-protection guarantee, the policy also violates the First Amendment's guarantee of freedom of speech. Once it is understood that the policy is indeed directed at speech rather than conduct – especially as applied to Richenberg – the policy should be clearly understood as a "content-based" regulation of speech, and thus subject to heightened scrutiny.[7]

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[7] The panel majority's conclusion that the First Amendment is not implicated in this case is mistaken. This is

If a law "by [its] general terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed" the law is a content-based regulation of speech. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). The "Don't Ask, Don't Tell" policy is plainly a content-based restriction because it identifies the speech that triggers the presumption on the basis of the content of the speech. Service members who say, "I am heterosexual" or who say nothing at all are not subject to dismissal but those who say "I am gay" are subject to dismissal.

Content-based regulations of speech are presumptively invalid under the First Amendment. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) ("Content-based regulations are presumptively invalid."). The fact that the policy involves the military does not mean that the courts are not competent to review the constitutionality of the policy or that the courts should abdicate their responsibility to do so. This Court has held that First-Amendment rights can be circumscribed in the military, but the

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not a case like the criminal cases that the panel majority cites. In *Wayte v. United States*, 470 U.S. 568 (1985), for example, the government used the defendant's "self-reporting" of an *actual* criminal violation – namely, the failure to register for the draft – as a basis for deciding to prosecute and for securing a conviction for that violation. *Id.* at 610-11. Likewise, in *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), the Supreme Court held that it did not violate the First Amendment to use racist speech "to establish the elements of a crime or to prove motive or intent" for a crime that was actually committed." *Id.* at 2201. Here, the mere statement of one's homosexuality has no "evidentiary value" because the human trait revealed by that statement is not supposed to disqualify a person from military service.

Court has only upheld restrictions on speech in the military when the restrictions "protect a substantial Government interest unrelated to the suppression of free expression" and when they operate in an evenhanded and appropriately limited fashion. *Brown v. Glines*, 444 U.S. 348, 354 (1980); *see also Greer v. Spock*, 424 U.S. 828, 838 – 39 (1976) ("there is no claim that the military authorities discriminated in any way" based on the speaker's "supposed . . . views" and the challenged regulation was not aimed at "the suppression of free expression").[8]

Any attempt to argue that the policy protects a substantial government interest and is no more restrictive than reasonably necessary to protect that interest should fail. The government, for example, cannot successfully argue that the policy is ultimately directed at the prohibition of acts. The purported fear that acknowledged gays will engage in prohibited acts should not be a valid basis for restricting free-speech rights. *See, e.g., Gay Lib v. University of Missouri*, 558 F.2d 848, 853 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). In any event, inappropriate behavior by gay service members, whether their sexual orientation is declared or undeclared, is already controlled by the Uniform Code of Military Justice and various Air Force regulations. *See* 10 U.S.C. § 801 *et seq.*

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[8] Here, the policy should warrant an even more searching review than in *Brown* and *Greer* because the policy imposes intentional and explicit content-based limitations on expression for the purpose of suppressing an unwelcome message. Nevertheless, even under a less stringent test, the government's purported justifications for the policy cannot withstand scrutiny.

(numerous provisions prohibiting sodomy, rape, sexual harassment, fraternization, etc.). The government has made no showing that these regulations are inadequate.

The "unit-cohesion" rationale of the government is likewise not valid under the First Amendment. This Court has been uncompromising in holding that an anticipated negative reaction to the content of the message is not sufficient, under the First Amendment, to justify the suppression of speech. One of the "bedrock principles" of the First Amendment is that the government cannot prohibit the expression of an idea "simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338, 2346 (1995) (the expression of one's "identity as openly gay" and the effort "to show that there are such individuals in the community, and to support . . . like men and women" merit First-Amendment protection).

4. Richenberg maintains that people with a homosexual orientation constitute a suspect class and that the "Don't Ask, Don't Tell" policy, therefore, should be subject to some form of heightened scrutiny under an equal-protection analysis. This Court has identified several criteria for determining whether heightened scrutiny applies. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In this case *all* of the factors that this Court usually considers support the conclusion that laws classifying according to *sexual orientation* are "suspect." Nearly every lower court that has decided that homosexuals are not a suspect class has done so with little or no analysis of this Court's criteria and has done so with an emphasis

that persons engaging in homosexual *conduct* do not constitute a suspect class.

Richenberg presented an extensive record below supporting each of the factors that this Court considers in deciding whether a classification is "suspect," including affidavits from leading historians, scientists, and social scientists. (Pet. COA App. 897-1124). The government submitted *no* evidence on any of these factors and the panel majority, like the district court, concluded – virtually without a word of analysis – that no heightened scrutiny should apply to the policy. The majority, instead, simply cites to other court decisions that conducted little of no analysis. The panel majority, like other lower courts, seems to have abandoned the analysis sanctioned by this Court and retreated to some other undisclosed formulation of this Court's legal standards.

5. The "Don't Ask, Don't Tell" policy as retroactively applied to Richenberg also raises serious problems. The policy was enacted *after* Richenberg stated that he is gay and then applied back in time to the statements that he made several months earlier. The panel majority gave no reason why the government should be allowed in this instance to apply a statute and regulations retroactively. Retroactive laws and regulations, especially those that result in a punishment of the sort here, are by their nature constitutionally suspect and should run afoul of the Bill-of-Attainder Clause and the APA. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) ("[r]etroactivity is not favored in the law" and regulations typically cannot be applied retroactively); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (disqualification

"from any opportunity to serve the Government is punishment, and of a most severe type").

6. Finally, the facts of this case and the decision of respondent Widnall to discharge Richenberg on the basis of his mere statement that he is gay not only demonstrate clearly that the presumption in the policy is irrebuttable but also that the decision to discharge him violates the APA. The panel majority concluded that the presumption in the policy is *not* irrebuttable but its sole basis for this conclusion was that "the district court found that seven servicemembers have successfully rebutted it." (App. 13). This supposed "finding" is supported by *only* a single sentence in an unsubstantiated declaration filed by an Air Force major in opposition to Richenberg's application for a temporary restraining order in the district court. Richenberg attempted to develop evidence of his own on this subject but was prevented by the district court when it prohibited Richenberg from availing himself of *any* method of discovery. The single-sentence assertion in the declaration is the 'same type of "evidence" that other courts have found highly suspect. *See, e.g., Holmes v. California Army Nat'l Guard*, 920 F. Supp. 1510, 1528-29 (N.D. Cal. 1996) ("the mere contention that a handful of service members have successfully rebutted the presumption is of little, if any, probative value"), *appeal pending*, No. 96-15726 (9th Cir.); *but see Thorne v. United States Dep't of Defense*, 945 F. Supp. 925, 929 (E.D. Va. 1996) (finding sufficient that only one of eight cases of supposed rebuttal supported government's assertion).

During his second BOI, Richenberg made a sworn statement under oath and subject to cross examination and he presented considerable and undisputed evidence

regarding his "past conduct, character and credibility" and the "nature and circumstances" of his statements. DoD Dir. 1332.30 Enc. 2 [2-2] 1b(1)-(5) (App. 83-84). All of this evidence demonstrated conclusively that Richenberg has no "propensity" to engage in prohibited homosexual conduct. The Air Force's Recorder did not present any evidence that would suggest anything to the contrary, including during his cross-examination of Richenberg. On appeal, the panel majority relied on the fact that Richenberg acknowledged under cross examination that he is physically attracted to men. (App. 16) Chief Judge Arnold correctly explained that "[t]his admission adds nothing to his admission of homosexuality. Were it enough to justify the Board's finding, the presumption would be effectively irrebuttable and, therefore, unconstitutional." (App. 21).

II. The "Don't Ask, Don't Tell" Policy Is Receiving Conflicting Results In an Increasing Number of Lower Court Actions.

The divided court of appeals in this case – on the merits by the panel and on the vote of the full court on the suggestion for rehearing en banc – is reflective of the division in the lower courts on the constitutionality of the "Don't Ask, Don't Tell" policy. Lower-court opinions on the issues raised by this case are proliferating at a significant rate and the courts are reaching conflicting conclusions. *Compare, e.g., Holmes*, 920 F. Supp. 1510 (policy violates First and Fifth Amendments), *with Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996) (upholding constitutionality of policy but with divided court: six judges holding that regulations of policy exceed statutory authority and four judges would

hold policy unconstitutional); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996) (reversing district court's First-Amending holding and remanding for consideration of whether prohibition on homosexual acts is valid).

The conflicting conclusions of the lower courts also included several decisions finding constitutional problems with the military's former policy. *See, e.g., Cammermeyer v. Aspin*, 850 F. Supp. 910, 917 (W.D. Wash. 1994) (striking down former policy as unconstitutional on the ground that the policy was rooted in prejudice against homosexuals), *dismissed as moot*, 97 F.3d 1235 (9th Cir. 1996); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) (policy is motivated by prejudice and without a legitimate objective). The Ninth Circuit's decision under the former policy in *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994), is particularly difficult to square with the Eighth Circuit's decision in this case. In *Meinhold*, the court held that the mere statement that one is a homosexual is insufficient to "show a concrete, fixed, or expressed desire to commit homosexual acts." 34 F.3d at 1479; *see also id.* at 1478 ("at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not"). If *Meinhold* were the law in the Eighth Circuit, Richenberg's mere statement that he is gay would not have properly triggered discharge proceedings because his statement would be insufficient evidence to give rise to a presumption of misconduct. *See Watson v. Perry*, 918 F. Supp. 1403, 1414 (W.D. Wash. 1996) (recognizing that under *Meinhold* discharge proceedings *cannot* constitutionally be triggered against a member who merely makes the statement

"I have a homosexual orientation" or "I am gay"), *appeal pending* No. 96-35314 (9th Cir.).

The number of cases in the federal courts is likely to increase given the increasing and record number of discharges under the policy. One organization's recent report shows that the government is currently experiencing the highest rate of discharge since 1987, with 850 service members discharged in 1996, compared with 722 in 1995, and 597 in 1994. *See* C. Dixon Osburn & Michelle M. Benecke, *Conduct Unbecoming: The Third Annual Report on "Don't Ask, Don't Tell, Don't Pursue"* at 2 & Exh. 2 (1997). This increasing number of discharges further supports the need for this Court to grant this petition and decided these issues.

CONCLUSION

Government sanctioned bigotry and prejudice in the military should be unconstitutional. For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. KAYSER
Counsel of Record
RANDALL TIETJEN
ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Petitioner

15 April 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4181

Richard F. Richenberg, Jr., Plaintiff – Appellant,	*	Appeal from the United States District Court for the District of Nebraska.
v.	*	
William J. Perry, Secretary of Defense; Sheila Widnall, Secretary of the Air Force, Defendants – Appellees.	*	

Submitted: April 8, 1996
Filed: October 3, 1996

Before RICHARD S. ARNOLD, Chief Judge, MAGILL, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Richard F. Richenberg, Jr., appeals the district court's[1] grant of summary judgment upholding an Air Force decision to honorably discharge him under the

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[1] The HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska.

military's "Don't Ask, Don't Tell" policy regarding homosexuals. The policy was adopted to implement a 1993 statute, 10 U.S.C. § 654. Richenberg claims that the policy violates his due process and free speech rights and is an unconstitutional Bill of Attainder. He also challenges the Air Force's decision under the Administrative Procedure Act ("APA"). Like two other circuits that have recently considered similar challenges, we find no constitutional infirmity in the statute and military policy. We also find no APA infirmity in this decision and therefore affirm.

I. THE POLICY

Prior to 1993, Department of Defense ("DOD") Directives and regulations of the individual services excluded from military service any person "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Dir. No. 1332.14 (1981), 32 C.F.R. Part 41, App. A (1992). Though the issue never reached this court, other circuits rejected numerous constitutional challenges to this long-standing policy. *See Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc); *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Ben-Shalom v, Marsh*, 881 F.2d 454, 456 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984).

In early 1993, President Clinton called for a reevaluation of the policy. The Senate and House Armed Services Committees held extensive hearings which included testimony by sociologists, gay rights activists, military personnel experts,

members of the armed forces in all ranks, and private citizens and organizations.[2]

DOD also intensively studied the issue. *See, e.g., Sen. Comm. Hr'gs* at 707-08 (statement of General Colin Powell). On July 19, 1993, the Secretary of Defense published a new policy regarding homosexuals and the military. At the core of that policy was the "Don't Ask, Don't Tell" concept: "Applicants for military service will not be asked or required to reveal their sexual orientation. . . . Service-members will be separated for homosexual conduct." "A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so." *Policy on Homosexual Conduct in the Armed Forces,* 1 Pub. Papers 1111 (July 19, 1993). General Powell deemed this policy "a choice which is in the best interests of the Armed Forces and the best interests of the American people." *Sen. Comm. Hr'gs* at 709.

On November 30, 1993, after further review and debate, Congress enacted 10 U.S.C. § 654.[3]

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[2] *See,* S. Rep. No. 112, 103d Cong., 1st Sess. 268-70 (1993); *Hearings on the Dept, of Defense Policy Excluding Homosexuals From Service in the Armed Forces,* 139 Cong. Rec. S755-01 (daily ed. Jan. 27, 1993) (statement of Sen. Nunn); *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Services,* 103d Cong., 2d Sess. (1993) ["Sen. Comm. Hr'gs"]; Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong.,1st Sess. (1993).

[3] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670-73.

That statute begins by reciting essential congressional findings, including:

> (8) Military life is fundamentally different from civilian life in that –
>
> > (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist a specialized society; and
> >
> > (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
>
> * * *
>
> (12) the worldwide deployment of United States military forces . . . and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
>
> (13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.
>
> * * *
>
> (15) the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of

> morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a). The statute defines "homosexual" as a person of either gender "who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." "Homosexual acts" are defined as "bodily contact . . . for the purpose of gratifying sexual desires." §§ 654(f)(1) & (3)(A).

In the provision at issue on this appeal, the statute provides that a servicemember [sic] "shall be separated from the armed forces" if there is a finding "[t]hat the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." § 654(b)(2). In other words, to avoid discharge, a servicemember who has declared, "I am a homosexual," must prove that he or she is not a homosexual *as that term is defined in the statute.*

In February 1994, the military implemented § 654. DOD Directive 1332.30 governs commissioned officers such as Richenberg. The relevant portion of this lengthy Directive provides:

> C. *HOMOSEXUAL CONDUCT*
>
> Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. . . . A member's sexual orientation is considered a personal and private matter, and is not a bar to

> continued service under this section unless manifested by homosexual conduct.
>
> * * *
>
> 1. b. . . . A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

DOD Dir. 1332.30, Encl. 2, ¶ C & C.1.b., at pp. 2-1, 2-2. The Air Force amended its Administrative Discharge Procedures, AFR 36-2, to conform with § 654 and Directive 1332.30.

II. RICHENBERG'S DISCHARGE

Richenberg entered the Air Force in 1985. After reaching, the rank of Captain and serving in the Gulf War, he began training for the Foreign Military Sales program in Saudi Arabia. In April 1993, he requested separation from the Air Force. The Air Force denied this request because his training was nearly complete. Richenberg then informed his commanding officer that he is homosexual, acknowledging that "I am forcing you to take

actions which may ultimately result in my discharge." The Air Force canceled his Saudi Arabian mission, reassigned him to Offutt Air Force Base in Nebraska, and initiated discharge proceedings.

After a December 1993 hearing, a Board of Inquiry recommended Richenberg's discharge. The Secretary of the Air Force ordered reconsideration under the new "Don't Ask, Don't tell" policy. After a second hearing in June 1994, the Board of Inquiry recommended separation with an honorable discharge. An Air Force Legal Review concluded that the Board's "findings support discharge for making homosexual statements and failing to rebut the presumption that the respondent has a propensity to engage in homosexual acts." The Air Force Board of Review agreed. On August 28, 1995, the Secretary of the Air Force ordered Richenberg's honorable discharge.

Richenberg then commenced this action. The district court granted the defendants' motion for summary judgment, rejecting Richenberg's constitutional challenge and concluding that substantial evidence supports the agency's decision. *Richenberg v. Perry*, 909 F. Supp. 1303 (D. Neb. 1995). Following Richenberg's appeal, we declined to enter an injunction preventing discharge during the appeal. *Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995). We now consider the merits of that appeal. The Fourth Circuit upheld the policy's constitutionality in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), *petition for cert. filed*, 65 U.S.L.W. 3033 (U.S. July 1, 1996) (No. 96-1). The Second Circuit reversed a district court decision that the rebuttable presumption in § 654(b)(2) is unconstitutional and remanded for consideration of the constitutionality of § 654(b)(1) in *Able v. United States*,

Nos. 95-6111 & 95-6141, 1996 WL 391210 (2nd Cir. July 1, 1996).

III. DUE PROCESS

Richenberg argues that 10 U.S.C. § 654(b)(2) and DOD Directive 1332.30 violate the Fifth Amendment's Due Process Clause, and particularly its equal protection component, by adopting an irrational and "constitutionally repugnant" presumption that discriminates against homosexuals on the basis of their "status."[4] Applying rational basis review, the district court held that the exclusion of those with a propensity or intent to engage in homosexual acts furthers the legitimate government purpose of protecting "unit cohesion, morale, good order and discipline and military readiness"; that the military can rationally infer such propensity or intent from a servicemember's declaration of homosexuality; and therefore that the "rebuttable presumption is a rational means of furthering the military's legitimate purpose." 909 F. Supp. at 1312-13. Richenberg argues that we should apply heightened scrutiny because homosexuality is a suspect classification. We reject this contention for the

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[4] Conversely, the Family Research Council as *amicus curiae* argues that DOD's presumption violates the plain language of § 654 because the statute prohibits *all* homosexuals from serving in the military. *See Thomasson*, 80 F.3d at 939 (Luttig, J., concurring). We agree with the Second Circuit that the word "propensity" in § 654 is ambiguous and that DOD has permissibly construed the ambiguous statute. *See Able*, 1996 WL 391210 at 19.

reasons stated by the Fourth Circuit in *Thomasson*, 80 F.3d at 927-28.[5]

In conducting rational basis review, we presume that the statute and implementing Directive are valid, placing the burden on Richenberg to show that they are not rationally related to any legitimate government purpose. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Our role is not "to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communication, Inc.*, 508 U.S. 307, 313 (1993). Substantive due process review is especially deferential when military policy is challenged. The Constitution expressly grants responsibility for military affairs to Congress, art. I, § 8, and the President, art. II, § 2, not the judiciary. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). When action under this authority is challenged, "judicial deference . . . is at its apogee." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Moreover, at a more practical level, deference to the considered professional judgment of military authorities is appropriate because:

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are

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[5] Five other circuits declined to give heightened scrutiny to the military's prior policies regarding homosexuals. *See Steffan*, 41 F.3d at 684; *Meinhold*, 34 F.3d at 1478; *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; *Rich*, 735 F.2d at 1229. The Supreme Court applied rational basis review in reviewing a state constitutional amendment adversely affecting homosexuals in *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). *See also Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

> essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.

Gilligan v. Morgan, 413 U.S. 1, 12 (1973) (emphasis in original). *See also Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Accordingly, "policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting." *Ben-Shalom*, 881 F.2d at 461.[6]

Richenberg argues that the "Don't Ask, Don't Tell policy" by which he presumably means § 654 as well as the DOD Directive – cannot be justified by any rationale other than an irrational catering to prejudice against and hatred of homosexuals. The flaw in this argument is its faulty premise. Richenberg asserts that the military policy is aimed at those with homosexual orientation or status. It is not. The statute carefully defines "homosexual" for these purposes as limited to those who commit, attempt to commit, intend to commit, or have a propensity to commit unacceptable sexual acts. *See* § 654(f)(1). The DOD Directive explicitly states that the military will not

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[6] The military policy at issue is entitled to even more deferential review because it is the product of extensive study, debate, and compromise by Congress and the President. *See Rostker*, 453 U.S. at 71; *Thomasson*, 80 F.3d at 927.

exclude servicemembers for their homosexual thoughts, opinions, fantasies, or orientation. Thus, we reject Richenberg's strident attack on the military for catering to prejudice against those with homosexual orientation.[7] The statute defines conduct that Congress has determined is inappropriate in the military, and we must review it on that basis. *See* 10 U.S.C. § 654(a)(13),(15), quoted at p. 4-5, *supra*.

We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in § 654(f)(3)(A). *See Thomasson*, 80 F.3d at 929 and cases cited. Military life requires servicemembers to sacrifice privacy:

> [Servicemembers] are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

S. Rep. 112 at 277 (statement of Gen. Powell). Military leaders have determined that excluding those with a propensity to engage in homosexual acts, like providing

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[7] For example, Richenberg asserts that "this is the same disgraceful way that African-Americans were treated" by the military in World War II. General Powell testified: "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument." S. Rep. 112 at 281-82.

separate housing for men and women, reduces sexual tensions that would jeopardize unit cohesion, the cornerstone of an effective military. *Id.* at 275-82; *see Sen. Comm. Hr'gs* at 595 ("in my 40 years of army service in three different wars I have become convinced that [unit cohesion] is the single most important factor in a unit's ability to succeed on the battle field") (statement of Gen. H. Norman Schwarzkopf).

Given these rational concerns, Congress and the President may rationally exclude those with a propensity or intent to engage in homosexual acts. "It is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or intent to violate (military rules] ripens into specific conduct prejudicial to good order and discipline." S. Rep. 112 at 294; *see Thomasson*, 80 F.3d at 929. *See also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 589-94 (1979) (employer may deny jobs to former drug abusers to avoid risk of likely future conduct); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-15 (1976) (State may retire police officers at age fifty to avoid dangers created by physically unprepared officers).

That brings us to Richenberg's contention that the DOD Directive's presumption fails rational basis review because it is irrational to presume that self-declared homosexuals have a propensity to commit homosexual acts. However, it is rational to assume that both homosexuals and heterosexuals "are likely to act in accordance with their sexual drives." *Steffan*, 41 F.3d at 692. For example, Richenberg acknowledged at the Board of Inquiry hearing that his homosexuality includes a sexual attraction to men. And the Lambda Legal Defense and

Education Fund declared in an amicus brief to the Supreme Court in *Bowers v. Hardwick*, "for gay people, sexuality and their sexual orientation play an especially central role in the definition of self. . . . [Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment." S. Rep. 112, at 283. Thus, we agree with the Fourth Circuit that "[t]he presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis." *Thomasson*, 80 F.3d at 930. *See also Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) ("To pretend that homosexuality . . . is unrelated to sexual conduct borders on the absurd"), *opinion withdrawn*, 875 F.2d 699 (1989) (en banc).

Finally, Richenberg argues that the presumption deprives him of due process because it is effectively irrebuttable. Once again, his argument ignores the statutory language. Congress perceived that "homosexual" is a potentially ambiguous term. Therefore, some persons who declare that they are "homosexual" or have a "homosexual orientation" may not fall within the statutory definition of persons likely to engage in homosexual *conduct* that is inconsistent with service in the military. The presumption in § 654(b)(2) and the DOD Directive allows an individual who has declared his or her homosexuality to prove that the statement merely reflects a permissible orientation. This is not a *de facto* irrebuttable presumption; indeed, the district court found that seven servicemembers have successfully rebutted it. 909 F. Supp. at 1313. Thus, even if an irrebuttable presumption

would fail rational basis review (an issue we need not address), § 654(b)(2) and the Directive do not.

IV. FREEDOM OF SPEECH

Richenberg argues that the Air Force violates First Amendment rights by targeting those who speak about their homosexuality and discharging them for "mere statements." Under the prior policy, the military asked applicants if they were homosexual and excluded those who answered affirmatively. The new policy is less restrictive – the military now ignores the issue unless a servicemember affirmatively evidences a propensity to engage in conduct inconsistent with military service.

We conclude that Richenberg's First Amendment argument is without merit. As discussed above, § 654 and the DOD Directive do not target mere status or speech. The policy seeks to identify and exclude those who are likely to engage in homosexual acts, as defined in § 654(f)(3). To this end, the policy provides that a servicemember's statement that he or she is a homosexual evidences that propensity. "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). *See also Wayte v. United States*, 470 U.S. 598, 610-14 (1985) ("passive enforcement" of criminal draft registration law does not violate the First Amendment); *United States v. Dinwiddie*, 76 F.3d 913, 926 n.10 (8th Cir. 1996). We thus agree with the Fourth Circuit that

> [t]here is no constitutional impediment, therefore, to the use of speech as relevant evidence of

> facts that may furnish a permissible basis for separation from military service. No First Amendment concern would arise, for instance, from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances.

Thomasson, 80 F.3d at 931. *Accord Able*, 1996 WL 391210 at 17 ("This evidentiary use substantially furthers the government's interest because . . . there is a correlation between those who state that they are homosexual and those who engage in homosexual acts."); *Ben-Shalom*, 881 F.2d at 462.

V. APA REVIEW

Richenberg argues that the Secretary's decision was arbitrary and capricious, contrary to law, and not supported by substantial evidence – the standards for judicial review under the APA, 5 U.S.C. § 706 – because his statements of homosexuality demonstrate no "propensity or intent to engage in homosexual acts," and therefore the rebuttable presumption "was never properly triggered." He notes that, at the second Board of Inquiry hearing, he presented overwhelming evidence regarding his past conduct, character, and credibility, and the nature and circumstances of *his* statements, "all of which demonstrate conclusively that he has no such propensity."

Assuming that a military discharge decision is reviewable under the APA,[8] that review "must be

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[8] Richenberg cites no authority for the proposition that Congress has authorized APA review of decisions to discharge

extremely deferential because of the confluence of the narrow scope of review under the APA and the military setting." *Henry v. Department of Navy*, 77 F.3d 271, 272 (8th Cir. 1996). Richenberg's contention – that his statements did not trigger the presumption – is contrary to the plain meaning of § 654(b)(2) as construed in the Directive. Any statement to the effect that a servicemember is a homosexual "triggers" the presumption, that is, imposes a burden to rebut the presumption if discharge proceedings are commenced.

Charitably reading Richenberg's brief as also arguing that he in fact rebutted the presumption, we agree with the district court that substantial evidence supports the Secretary's decision to the contrary. At the Board of Inquiry hearing, Richenberg stated that he is homosexual but does not intend to engage in prohibited homosexual acts. However, on cross-examination, he admitted he is sexually attracted to men. When asked whether, if the right person came along, he "would not be opposed to having sex with them (sic)," he answered, "I can't say that I've entirely accepted that yet." In addition, he answered that he did not know whether he would marry a man if it were legal to do so. None of this is particularly inflammatory, and we agree that Richenberg submitted strong evidence of fine character and an excellent military career. But "substantial evidence is something less

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an officer from military service. Remarkably, the Secretary simply ignores the issue. We suspect it is a doubtful proposition. *See Webster v. Doe*, 486 U.S. 592 (1988); *Chappell v. Wallace*, 462 U.S. 296 (1983). But the government has not argued the point, so we do not consider it. *See Air Courier Conference v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 522-23 (1991).

than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not indicate that substantial evidence fails to support an agency's findings." *Henry*, 77 F.3d at 273. The Board of Inquiry's recommendation was based upon its assessment of Richenberg's statement that he has no intent or propensity to commit homosexual acts in light of his equivocal answers on cross examination. That type of credibility determination is normally left to the agency's discretion, *see Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), and Richenberg does not suggest we are dealing with abnormal agency fact-finding.

VI. CONCLUSION

We have considered Richenberg's bill of attainder claim and conclude it is without merit. *See Selective Serv. Sys. v. Minnesota Pub. Int. Res. Group*, 468 U.S. 841 (1984); *Ambassador Books & Video, Inc. v. Little Rock*, 20 F.3d 858, 865 (8th Cir.), *cert, denied*, 115 S. Ct. 186 (1994). Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

RICHARD S. ARNOLD, Chief Judge, dissenting.

The military may no longer discharge homosexual servicemembers simply because they are homosexual. Instead, federal law authorizes the dismissal of homosexual servicemembers only if they engage or intend to engage in prohibited homosexual conduct, or if they demonstrate a propensity to do so. The statute, however, blurs the line between status and conduct by making a

servicemember's admission that he or she is a homosexual sufficient grounds for presuming that the servicemember is likely to or intends to engage in prohibited conduct. If this presumption were irrebuttable, the statutory scheme would raise serious First Amendment problems. Accordingly, it is our job to review the record with great care to ensure that Captain Richenberg had a proper opportunity to rebut the presumption. After reviewing the evidence submitted to the Board of Inquiry, it is my view that Captain Richenberg met his burden and should not have been discharged.

The First Amendment prohibits the government from penalizing people because of their thoughts and feelings. Indeed, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Captain Richenberg admitted that he is a homosexual but also stated under oath that he did not intend to violate military law by acting upon those feelings. To assume automatically that he would is to disadvantage him simply for who he is and not for what he has done or will do. The First Amendment does not allow the government to make this assumption without at least affording Captain Richenberg some realistic opportunity to show that the assumption is erroneous in his particular case.

An irrebuttable presumption would also violate the First Amendment by penalizing servicemembers solely for the content of their speech. It is one thing to use a person's speech as evidence to help establish an element of some offense. It would be quite another matter, however, to presume conclusively from Captain Richenberg's expression that he intended to or was likely to violate

military regulations when he has expressly disavowed such an intent. Such a scheme would target only speech and would thus violate the First Amendment absent some compelling justification for the restriction.

The propensity presumption is supposed to be rebuttable. See Brief of Appellees 40.[9] Given that excessive deference to the presumption by the Board of Inquiry would violate the First Amendment, I would review the record *de novo* to ensure that the Board of Inquiry gave Captain Richenberg a fair chance to rebut the presumption. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984) (in First Amendment cases, appellate courts should review *de novo* questions of fact that are tried to a judge or jury).

It is undisputed that Captain Richenberg told several people that he was a homosexual. He swore, however, that he had no intention of acting upon his orientation in violation of military regulations and that he was "very capable" of abstaining from prohibited conduct. Appellant's App. 296-97. The record presents many reasons to believe him and insufficient reason to doubt him. Captain Richenberg appears to have been an outstanding Air

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[9] In addition to pointing out that the presumption is rebuttable, the government invokes the customary deference that courts give to military judgments on the need to restrict certain types of speech. See Brief of Appellees 43. The government, however, does not attempt to justify an irrebuttable presumption, and this dissent does not challenge the validity of a properly applied rebuttable presumption. Moreover, deference to military judgment does not extend to the application of law to fact, in an area in which a military tribunal carries no special expertise.

Force officer. His Officer Performance Reports (OPRS) are full of praise for his professionalism, dedication, and leadership abilities, and he received many medals over the course of his Air Force career. A characteristic report described him as "the most professional and highly motivated officer I have had on my crew." *Id.* at 375. Another called him the reporter's "most professional officer!" *Id.* at 369. He flew 25 combat missions in Operation Desert Storm. Brief of Appellant 12.

Four fellow officers and friends also testified on Captain Richenberg's behalf at the Board of Inquiry, praising his abilities and performance. All four attested to his honesty, integrity, and discipline, as well as to his dedication and loyalty to the Air Force. One of these officers, Captain Yaphe, testified that he had told a fellow officer a month before the hearing that he had no reason to believe that Captain Richenberg would not abstain from homosexual conduct if he said he would. Appellant's App. 263.

The government introduced no evidence that called any of this testimony into question. Nor did the Board of Inquiry explain its finding that Captain Richenberg had failed to rebut the presumption. In fact, the Board of Inquiry devoted only a single line to the issue. ("The Board finds that the respondent does have a propensity to engage in homosexual acts.") *Id.* at 451. As things stand, we do not even know whether the Board found that Captain Richenberg intended to violate military regulations, that he was likely to do so, or both. Without an explanation we are forced to rely upon those sources that are available to us, without the aid, for example, of the Board's evaluation of Captain Richenberg's demeanor at the hearing. It may be that the Board simply did not find

Captain Richenberg to be credible. If so, it should say so and explain why, for it may also be that the Board impermissibly based its decision upon an assumption that homosexuals in general will not be able to abstain from prohibited conduct. *Cf. Hall v. Chater*, 62 F.3d 220 (8th Cir. 1995) (holding that ALJs who reject disability claimants' subjective complaints of pain must make express credibility finding and give reasons for disbelieving the testimony).

The Air Force Board of Review provided more explanation for the decision, but its reasoning is no more convincing. It relied upon Captain Richenberg's admission that he was physically attracted to men. Appellant's App. 458. This admission adds nothing to his admission of homosexuality. Were it enough to justify the Board's finding, the presumption would be effectively irrebuttable and, therefore, unconstitutional.

The Board of Review also discounted the testimony of Captain Richenberg's character witnesses because "none of [his] witnesses was asked about (his] behavior or to opine as to his propensity to commit homosexual acts." *Ibid.* Character witnesses in such proceedings will in general be able to testify, as Captain Yaphe did, only to a servicemember's sense of honor, duty, and discipline. Even if they cannot "opine" specifically as to his sexual propensities, they can say whether he is the kind of man who does what he promises to do. The record establishes that Captain Richenberg is that kind of man.

I would reverse the judgment of the District Court and remand with directions to grant Captain Richenberg's motion for summary judgment. In the alternative, I

would remand the case to the District Court with instructions for it to remand to the Board of Inquiry for additional explanation of its decision. I express no view on the large constitutional questions discussed in this Court's opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

RICHARD F. RICHENBERG, JR., Plaintiff, v. WILLIAM J. PERRY, Secretary of Defense, in his official capacity; SHEILA WIDNALL, Secretary of the Department of the Air Force, in her official capacity, Defendants.	8:CV95-22393 ORDER AND JUDGMENT

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Plaintiff's motion for summary judgment (Filing No. 31) is denied;

2) Defendants' motion for summary judgment (Filing No. 32) is granted; plaintiff's complaint is dismissed;

3) The temporary restraining order entered September 8, 1995 (Filing No. 14) is dissolved.

DATED this 11th day of December, 1995.

BY THE COURT:

/s/
LYLE E. STROM, Senior Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

RICHARD F. RICHENBERG, JR., Plaintiff, v. WILLIAM J. PERRY, Secretary of Defense, in his official capacity; SHEILA WIDNALL, Secretary of the Department of the Air Force, in her official capacity, Defendants.	8:CV95-22393 MEMORANDUM OPINION

This matter is before the Court on the parties' cross motions for summary judgment (Filing Nos. 31 and 32). Plaintiff Richard F. Richenberg, Jr., is a Captain in the United States Air Force stationed at Offutt Air Force Base ("Offutt AFB") near Omaha, Nebraska. Defendant William J. Perry is the Secretary of the Defense and defendant Sheila Widnall is the Secretary of the Department of the Air Force. Plaintiff filed this action requesting permanent injunctive and declaratory relief prohibiting defendants from discharging him from the Air Force as a result of his statement that he is a homosexual. Plaintiff challenges the government's policy regarding homosexuals in the military primarily on the grounds that the policy on its face and as applied to him, violates his First Amendment freedom of speech and denies him equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments. Plaintiff also alleges that the Air Force

discharge proceedings violated the Administrative Procedures Act. Finally, plaintiff alleges that the policy is unconstitutional as a Bill of Attainder. The Court heard oral arguments on this matter on November 6, 1995. After careful consideration of the motions, the briefs and the applicable law, the Court makes the following findings and conclusions.

THE POLICY

On January 29, 1993, President Clinton directed Les Aspin, Secretary of Defense at the time, to reevaluate the Department of Defense's ("DOD") policy regarding homosexuals in the military. Secretary Aspin commissioned two independent studies to evaluate the DOD's existing policy and to consider new policy options. Between March and July, 1993, the Senate and House Armed Services Committees held extensive public hearings on the matter. Pursuant to President Clinton's order, Secretary Aspin issued a new directive regarding homosexuals in the military on July 19, 1993. The Senate and House Armed Services Committees conducted further hearings and recommended that Congress enact the policy as contained in the July 19 directive. In November 1993, Congress enacted the policy as § 571 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1670-73 (codified at 10 U.S.C. § 654). President Clinton signed the policy into law on November 30, 1993.

In enacting the "Policy concerning homosexuality in the armed forces" Congress made extensive findings, including the finding that:

> (8) Military life is fundamentally different from civilian life in that –
>
> > (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
> >
> > (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

10 U.S.C. § 654(a). Congress also found that:

> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Id. The policy provides that a service member shall be separated from the armed forces if, pursuant to the regulations, one or more of the following is found:

> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts.
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who

> engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
>
> (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b).

On December 21, 1993, the DOD issued Directive 1332.30, titled "Separation of Regular Commissioned Officers" to implement the policy. The Directive defines "homosexual conduct" to include "a homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." Directive 1332.30 at 1-1. The Directive further provides:

> C. HOMOSEXUAL CONDUCT
>
> A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1.

Id. at 2-1. Section C.1. reiterates the three grounds for separation outlined by 10 U.S.C. § 654. Regarding the "statement" grounds, however, the Directive elaborates that:

> A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

Directive 1332.30 at 2-2. The Directive further provides that in determining whether an officer has successfully rebutted the presumption, the military may consider: (1) whether the officer has engaged in homosexual acts; (2) the officer's credibility; (3) testimony from others regarding the officer's past conduct, character and credibility; (4) the nature and circumstances of the of the officer's statement; and (5) any other evidence relevant to whether the officer is likely to engage in homosexual acts. *Id.* In conformity with Directive 1332.30, the Department of the Air Force amended its regulation AFR 36-2 regarding officer administrative discharge procedures. The pertinent portion of AFR 36-2 repeats much of the language contained in DOD Directive 1332.30, and together, shall be referred to as the "regulations." Section 654 and the regulations constitute the "policy" under which defendants seek to discharge plaintiff.

FACTS

Since entering the Air Force in April 1985, plaintiff has served with distinction as an Electronic Warfare Officer ("EWO"). After serving a three year tour of duty at Eielson Air Force Base in Alaska, plaintiff was transferred to Offutt Air Force Base in 1989. After serving in the Gulf War, plaintiff returned to Offutt AFB and was subsequently selected for the Foreign Military Sales ("FMS") program to train and support personnel in Saudi Arabia. Prior to going to Saudi Arabia, plaintiff was sent to Texas for FMS training. Towards the end of his training in Texas in April, 1993, plaintiff requested that his assignment to Saudi Arabia be canceled and that he be separated from the Air Force. This request was denied. In May, 1993, plaintiff faxed a letter to Lieutenant Colonel David G. Bell, his commanding officer at Offutt AFB, informing Lt. Col. Bell that he is homosexual. Lt. Col. Bell showed the letter to Lt. Col. David Trask who was about to assume Lt. Col. Bell's duties. At about the same time, plaintiff told a few friends and fellow officers that he was homosexual. (Pl's Br. at 20). The Air Force canceled plaintiff's assignment to Saudi Arabia and reassigned him to Offutt AFB.

As a result of his letter and statements, the Air Force initiated proceedings to discharge plaintiff. A Board of Inquiry conducted a hearing on the matter, and on December 2, 1993, recommended that plaintiff be discharged. Before the Air Force took final action on that recommendation, however, the Secretary directed that the case be reconsidered under the recently enacted policy regarding homosexuals in the military. The Air Force reinitiated discharge proceedings in April, 1994, and a

second Board of Inquiry conducted a hearing in June, 1994. At the hearing, plaintiff read a sworn statement and testified that he had not in the past and would not in the future engage in any prohibited conduct. On June 21, 1994, the Board of Inquiry recommended that plaintiff be discharged. Following the Board of Inquiry, the Air Force processed plaintiff's case through several procedural steps, including a Board of Review. At each stage, it was recommended that plaintiff be discharged. On August 28, 1995, the Secretary of the Air Force ordered that plaintiff be removed from active duty and issued an honorable discharge certificate.

The Air Force scheduled plaintiff's discharge for September 8, 1995. On September 5, 1995, plaintiff filed with this Court an amended-verified complaint and a motion for temporary restraining order (Filing Nos. 4 and 5). On September 7, 1995, the Court conducted a hearing on the temporary restraining order. On September 8, 1995, the Court issued an order (Filing No. 14) and memorandum opinion (Filing No. 15) granting plaintiff's motion for TRO and setting an expedited schedule for cross motions for summary judgment which the Court now considers.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment will

not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order for the moving party to prevail, it must demonstrate to the Court that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is genuine if it has any real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). On a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 250. However, the nonmoving party may not rest on the mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. And if the plaintiff cannot support each essential element of his claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders other facts immaterial. *Id.* at 322-23. The Court reviews the parties' cross-motions for summary judgment in light of the foregoing standard.

DISCUSSION

(a) General Principles

Before addressing the merits of plaintiff's case, the Court must outline several principles which apply generally to plaintiff's constitutional claims. It is the sworn duty of federal courts to determine whether a statutory

restriction unconstitutionally infringes on an individual's liberty. This duty is not discharged when the restriction arises in the context of military affairs. However, the "customary deference" which federal courts accord to congressional judgments is perhaps never more pronounced than when the "case arises in the context of Congress' authority over national defense and military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). This is because "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Furthermore, courts have recognized their relative "incompetence" in the area of military affairs:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court discussed at length the tension between its "constitutional responsibility" and the appropriate deference to accord Congress in the military arena. The Court in *Rostker* was called upon to decide whether the Military Selective Service Act violated the Fifth Amendment Due Process Clause by denying equal protection of the laws in requiring only men to register for the draft. The Court noted that although judicial deference is "at its apogee"

when considering Congress' authority to raise and support armies, "deference does not mean abdication." *Id.* at 70. The Court stated that while this deference does not "refine" the applicable constitutional tests, it "cannot ignore Congress" broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal." *Id.* at 71-72. This is especially true when "Congress specifically considered the question of the Act's constitutionality." *Id.* at 64.

As in *Rostker*, Congress enacted the policy in the present case pursuant to Article I Section 8 of the Constitution. 10 U.S.C. § 654(a)(i)-(3). In addition, the policy "received considerable national attention," "was the subject of wide-ranging public debate," and was "extensively considered by Congress in hearings, floor debate, and in committee." *Rostker*, 453 U.S. at 72. Accordingly, the Court will evaluate the policy in light of the principles articulated in *Rostker*.

(b) First Amendment

Plaintiff alleges that the policy infringes on his First Amendment rights by imposing a content/viewpoint-based restraint on his freedoms of speech and association (Count VI).[1] Specifically, plaintiff argues that the policy

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[1] Plaintiff also alleges that the policy violates his right to equal protection under the laws as guaranteed by the Fifth and Fourteenth Amendments by restricting his exercise of the fundamental right to freedom of speech (Count II). The Court

"silences a group of speakers not only because of what they say but because of who they are," thereby "implicat[ing] the First-Amendment value of promoting individual dignity and integrity." (Pl.'s Br. at 40, 54). Accordingly, plaintiff argues that the policy is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The Supreme Court has long recognized, however, that First Amendment challenges of military regulations are subject to a different analysis than in a civilian context:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of

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will consider plaintiff's equal protection claim based on the alleged denial of a fundamental right together with his substantive First Amendment claim since the governing standard will be same. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 55 n. 4 (1986) ("respondents can fare no better under the Equal Protection Clause than under the First Amendment itself"); and 3 Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 2nd § 18.40 (1992) ("if [a court] finds that a classification regarding speech or associational rights does not infringe first amendment freedoms, it is likely to find that the classification does not violate equal protection because it has determined that the law does not constitute the improper allocation of a fundamental right").

> discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758 (1974). Accordingly, "[t]he rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.' " *Brown v. Glines*, 444 U.S. 348, 354 (1980) (citations omitted). Thus, " '[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.' " *Parker*, 417 U.S. at 759 (quoting *United States v. Priest*, 45 C.M.R. 338, 344 (1972).

The Court applied these principles in *Goldman v. Weinberger*, 475 U.S. 503 (1986), when considering whether an Air Force regulation prohibiting an Orthodox Jewish member from wearing a yarmulke violated the First Amendment. Giving "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," the Court noted that personal identity in the military is subordinate to the "overall group mission." *Id.* at 507-08. In holding that the regulation did not violate the First Amendment, the Court stated:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of

> military service "is the subordination of the desires and interests of the individual to the needs of the service."
>
> . . .
>
> These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."

Id. at 507 (citations omitted).

Applying these principles to the present case, the Court concludes that the policy does not violate plaintiff's First Amendment rights. There is little doubt that the policy affects speech. But as the Seventh Circuit Court of Appeals recognized in addressing this very issue, "it does so only incidentally, in the course of pursuing other legitimate goals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989). The only restriction on plaintiff's speech is the ability to state that he is homosexual and the failure to rebut the presumption created by that statement. Although, this may result in a denial of self-identity, plaintiff's interests in autonomy and self-identity are subordinate to the military interests in good order and discipline, morale, unit cohesion and combat readiness. Thus while the presumption created by a statement of homosexuality may inhibit speech to a limited extent, the Court "cannot say that the infringement rises to the level of being unconstitutional." *Ben-Shalom*, 881 F.2d. at 461. This is true especially in light of the deferential review of First

Amendment challenges of military regulations. Accordingly, plaintiff's First Amendment claim and equal protection claim based on the denial of a fundamental right must fail.

(c) Equal Protection

Plaintiff alleges that the policy denies him equal protection of the laws by: (1) discharging him from the Air Force on the basis of his status as homosexual; (2) requiring him to rebut a presumption which does not apply to heterosexuals; and (3) discriminating against him on the basis of gender (Counts I, III and IV).

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection applies to federal actions through the Fifth Amendment Due Process Clause. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975). The equal protection analysis is identical under the Fifth and Fourteenth Amendments. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

A threshold issue in equal protection analysis is determining whether to apply strict scrutiny, intermediate scrutiny, or rational-basis review. Plaintiff argues that strict scrutiny applies because the policy excludes homosexuals on the basis of status rather than conduct and because homosexuals constitute a suspect class. Plaintiff concedes that neither the Supreme Court nor the Eighth Circuit Court of Appeals has ever held that homosexuals constitute a suspect-class. However, plaintiff urges the

Court to reach this conclusion based on the suspect-class criteria identified by the Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and *Frontiero v. Richardson* 411 U.S. 677, 684-86 (1973). In the alternative, plaintiff argues that the Court should apply heightened scrutiny because the policy unfairly discriminates on the basis of gender, a quasi-suspect classification.

Five federal courts of appeals have uniformly determined that rational-basis review is the proper analysis to apply to equal protection challenges of the military's policy regarding homosexuals. *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); and *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). In light of this precedent and because "courts have been very reluctant, as they should be in our federal system" to create new suspect classes, the Court declines to extend suspect classification status to homosexuals. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). In addition, plaintiff's attempt to obtain heightened scrutiny on the basis of gender discrimination must fail since the policy applies equally to male and female service members. Accordingly, the Court will apply rational-basis review to plaintiff's equal protection claims.

The standards for rational-basis review are familiar ones. A non-suspect classification is "accorded a strong presumption of validity" and "cannot run afoul of the Equal Protection Clause if there is a rational relationship

between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 113 S.Ct. 2637, 2642 (1993). The statute is presumed constitutional and the government has no obligation to produce evidence to sustain the rationality of the classification. *Id.* at 2643. Instead, the challenging party has the burden to " 'negative every conceivable basis which might support it.' " *Id.* (citations omitted). Classifications survive rational-basis review despite Congress' "generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Id.* (citations omitted). In short, "[i]t is hard to imagine a more deferential standard than rational basis, but when judging the rationality of a regulation in the military context, we owe even more special deference to the 'considered professional judgment' of 'appropriate military officials.' " *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (*quoting Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)).

Under the rational-review analysis, the Court must first determine whether the policy is directed at the achievement of a legitimate governmental purpose. After months of public debate and extensive hearings, Congress expressed the purpose of the policy and the reasoned judgment of the Commander-in-Chief, the Secretary of Defense and the leaders of the military branches when it stated:

> (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
>
> . . .

> (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

10 U.S.C. § 654(a). It is difficult to conceive of more legitimate governmental concerns than matters of national defense and the safety and security of American military personnel. A policy designed to protect these interests by eliminating a potential threat to them is certainly aimed at a legitimate governmental purpose. This is especially true considering Congress' broad power to establish conditions and qualifications for service in the armed forces. Exercising this discretion, Congress has determined that due to the nature of military life, the presence of persons who demonstrate a propensity to engage in homosexual conduct presents an unacceptable risk to unit cohesion, morale, good order and discipline and military readiness. Thus, the policy of excluding from the military those who demonstrate a propensity to engage in homosexual conduct is directed at several and related legitimate governmental purposes.

Plaintiff argues that the policy is based on prejudice and that defendants, asserted justifications are invalid. The Court acknowledges, as did the court in *Ben-Shalom*, that there certainly is prejudice against homosexuals within the armed forces. However, the Court is called upon to determine the constitutionality of the policy – not its wisdom. That determination is for Congress to make as overseer of the military and the Court should not second-guess its authority in this area. As noted above, this principle applies with particular force when Congress has made a studied choice between alternatives and specifically considered the policy's constitutionality. As

the Seventh Circuit reasoned in *Ben-Shalom v. Marsh*, 881 F-2d 454 (7th Cir. 1989):

> [T]he Army should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces. . . . We, as judges, although opponents of prejudice of any kind, should not undertake to order such a risky change with possible consequences we cannot safely evaluate.

Id. at 461. Accordingly, plaintiff's argument must fail.

The Court must next inquire whether the policy rationally furthers these purposes. Plaintiff argues that the presumption created by a statement of homosexuality is irrational and impermissibly discriminates on the basis of homosexual orientation or status and not on the basis of conduct.[2]

The Court concludes, as have other courts, that the military may rationally and reasonably infer from a statement of homosexuality that a member has a propensity to engage in homosexual conduct. For example, in *Ben-Shalom, supra,* the plaintiff was an Army reservist who was denied reenlistment due to her statement that she was a lesbian. The plaintiff challenged the Army regulation as creating a classification based on status and not

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[2] There is no doubt that the military may constitutionally prohibit homosexual conduct. *Meinhold v. Department of Defense*, 34 F. 3d 1469, 1477 (9th Cir. 1994); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984); *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

conduct. Rejecting this argument, the court held that "the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." 881 F.2d at 464. The court reasoned that the plaintiff's "forthright admission" of homosexuality "reasonably implies, at the very least, a 'desire' to commit homosexual acts." *Id.* at 460. The court added:

> Plaintiff's lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct.

Id. at 464.

Similarly, in *Steffan v. Perry*, 41 F.3d 677, (D.C. Cir. 1994) (en banc), the plaintiff was discharged from the Naval Academy solely on the basis of his statement that he is homosexual. The court noted that "[h]omosexuality, like all forms of sexual orientation, is tied closely to sexual conduct," and that to pretend otherwise " 'borders on the absurd.' " *Id.* at 689-90 (citations omitted). Thus, "the military may reasonably assume that when a member states that he is homosexual, that member means that he either engages in or is likely to engage in homosexual conduct." *Id.* at 686. And while it is conceivable that a person would describe himself as homosexual despite the absence of any ongoing conduct or probability of such

conduct, the fact that there may be exceptions is irrelevant "so long as the classification (the regulation) in the run of cases furthers its purpose, and we readily conclude that it does." *Id.* Accordingly, the court held that the policy of discharging members who admit to being homosexual rationally furthers the legitimate interest of banning persons who have a propensity to engage in homosexual conduct, especially considering that "the human sexual drive is enormously powerful and that an open declaration that one is homosexual is a rather reliable indication as to the direction of one's drive." *Id.* at 690. Thus, the plaintiff's claim "that the government cannot rationally infer that one who states he or she is a homosexual is a practicing homosexual, or is at least likely to engage in homosexual acts, is so strained a constitutional argument as to amount to a basic attack on the policy itself." *Id.* at 693.

Thus, the Court concludes that the use of a rebuttable presumption is a rational means of furthering the military's legitimate purpose of prohibiting service members who demonstrate a propensity to engage in homosexual conduct from serving in the armed forces. It is of no constitutional consequence that the plaintiff may in fact have no propensity to engage in homosexual conduct. As stated above, under rational-basis review, the military need not create an exact fit between its policy and the goal sought to be achieved. Because the policy generally advances its purpose, the Court concludes that plaintiff's equal protection challenges must fail.

(d) Due Process

Plaintiff also alleges that the policy violates due process and procedural fairness (Count V). Specifically, plaintiff argues that the presumption is simply irrational and that it, in effect, creates an irrebuttable presumption. This claim is without merit. As discussed above, the military may constitutionally infer from a statement of homosexuality that a service member has a propensity to engage in homosexual conduct. In addition, seven service members thus far have successfully rebutted the presumption. A service member is afforded a full hearing and opportunity to rebut the presumption. Whether the member successfully rebuts the presumption is determined on an individual basis. Finally, the Court agrees with defendants' assertion at oral argument that there is no guarantee to the service member that what he or she offers at the hearing will be accepted.

(e) Right of Privacy

Plaintiff alleges that the policy infringes on his constitutionally protected right of privacy (Count VII). Several courts have rejected this argument in challenges to the military's former policy regarding homosexuals. *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) *cert. denied* 503 U.S. 951 (1992); *Woodward v. United States*, 871 F.2d 1068, 1075 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-98 (D.C. Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 (10th Cir. 1984). In addition, while not explicitly ruling on the issue of privacy, the court in *Ben-*

Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), observed that:

> The privacy expectations of a civilian, wherever their outer limit may be, cannot be compared to the substantially more limited privacy expectations accompanying military life. Plaintiff in the present case voluntarily sacrificed much personal privacy and liberty by deliberately seeking to be in the Army where privacy and liberty are necessarily at a premium.

Id. at 465. Finally, the Court agrees with the reasoning in *Rich, supra*, that even if the policy does implicate plaintiff's privacy interests, they are outweighed by the military's legitimate interests articulated above. 735 F.2d at 1228. Accordingly, plaintiff's claim that the policy denies him of his right to privacy must fail.

(f) Bill of Attainder

Plaintiff asserts that the Act (10 U.S.C. § 654) constitutes a bill of attainder proscribed by Article I, § 9, Clause 3 of the United States Constitution (Count VIII). That section provides that: "[no] bill of attainder or ex post facto law shall be passed."

A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977). Thus, there are three factors which determine whether a particular piece of legislation constitutes a bill of attainder: (a) whether the statute identifies an individual or individuals or easily ascertainable members

of a group, (b) whether the statute inflicts punishment and (c) whether the punishment has been inflicted without a judicial trial. All three factors must be met. Because the Court finds that the policy as stated in 10 U.S.C. § 654 does not "inflict punishment" within the meaning of the bill of attainder clause, factors (a) and (c) will not be considered.

In *Selective Svc. Sys. v. Minn. Pub. Int. Res. Gp.*, 468 U.S. 841 (1984), the Supreme Court stated:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes" and (3) whether the legislative record "evinces a congressional intent to punish." *Nixon, supra*, at 473, 475-476, 478, 53 L.Ed.2d 867, 97 S.Ct. 2777.

Id. at 852. The military policy pertaining to homosexuality does not fall within the historical meaning of legislative punishment. As noted in *Selective Svc. Sys.*, bills of attainder at common law often imposed death penalty and lesser punishments including imprisonment, banishment, and the punitive confiscation of property. *Id.* The Court noted that "in our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." *Id.* at 852. However, in this case, homosexuals are not barred from the Air Force simply because they are homosexuals. In this respect, this case is quite similar to

the Selective Service case where the Court noted: "A statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment." *Id.* at 853. That case involved application for aid benefits under Title IV, which was tied to the applicants having properly registered with the Selective Service System. Here, the statute leaves open the possibility of qualifying for continued service in the Air Force when the person who has declared him or herself to be a homosexual overcomes the presumption that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts.

Further, the policy is not concerned with somehow singling out homosexuals for punishment. The history behind the policy does not "evince an intent to punish" homosexuals. Indeed, maintaining the discipline and morale of the armed services is a compelling governmental interest justifying the adoption of the policy.

Finally, this is not a new restriction placed upon members of the Air Force. The policy of the Air Force has long barred participation by homosexuals. This statute, in fact, moderates the prior policy by prohibiting discharge simply on the basis of status, and permits the service member to rebut what formerly was an irrebuttable presumption of the Air Force.

For these reasons, the Court rejects plaintiff's contention that the statute is proscribed by the provisions of the Constitution prohibiting Congress from enacting bills of attainder.

(g) Administrative Procedures Act

Plaintiff contends that the decision to discharge Captain Richenberg violates the Administrative Procedures Act (Count IX). His first claim is that "the decision . . . to discharge Captain Richenberg simply on the basis of his statement that he is gay violates the Administrative Procedures Act." His second contention is that the decision of defendant Widnall is arbitrary and capricious, contrary to law and unsupported by substantial evidence.

Regarding his first contention, plaintiff contends that the Act and Regulations only authorize discharge proceedings for statements when a service member makes a statement that "demonstrates a propensity or intent to engage in homosexual acts," citing Directive 1332.30 at 1-1. That section defines homosexual conduct to include "a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts." However, the plaintiff ignores the operative provisions of 1332.30(C)(1)(b), quoted *supra*, at p. 5.

The Court has already addressed the validity of this presumption. While this may not be a wise policy, policy-making is not for the courts. Having found that the military may adopt such a policy effectively disposes of this contention.

The second contention is that the decision to discharge him based upon the Board of Inquiry hearing is arbitrary and capricious, contrary to law, and unsupported by substantial evidence. Plaintiff cites 5 U.S.C. § 706(2)(A-F) as the basis for these objections. That section of the United States Code deals with the scope of review of an agency action and states in part that the

reviewing court shall hold unlawful and set aside any agency action found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; . . . (E) unsupported by substantial evidence. . . ." The Court has already disposed of Factor (B) and will not address it again.

This administrative discharge was initiated pursuant to AFR 36-2, adopted by the Department of the Air Force effective October 1, 1984, and a Board of Inquiry was convened by Special Order A-010 (Government Exhibit 1). The authority for the convening of a Board of Inquiry is premised on 10 U.S.C. § 1182. The Board of Inquiry convened on June 20-21, 1994. Plaintiff and the government both presented evidence, resulting in a decision in which the Board recommended that plaintiff be removed from active duty with an honorable discharge. This recommendation was reviewed by a Board of Review and subsequently by the Secretary of the Air Force, both of whom approved and adopted the recommendation of the Board of Inquiry. The Secretary directed that the plaintiff be given an honorable discharge from the United States Air Force. The standard of review of this agency action has been set forth by the United States Court of Appeals for the Eighth Circuit in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713 (1979), as follows:

> We turn now to the merits of the case. The scope of judicial review of agency action has been set forth by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136(1971). The reviewing court must first decide whether the agency acted

> within the scope of its statutory authority. *Id.* at 415, 91 S.Ct. 814. If it has, the court must then determine whether its actual choice was "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with law." *Id.* at 416, 91 S.Ct. at 823, quoting 5 U.S.C. § 706(2)(A). See *CPC International Inc. v. Train*, 515 F.2d 1032, 1043-1044 (8th Cir. 1975), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977).

This inquiry necessarily involves a review of the decision of the Board of Inquiry which is the basis for the decision of the Board of Review and the Secretary. The Court believes that the appropriate standard of review of the action of the Board of Inquiry is governed by "the substantial evidence" test. *See Castillo v. Army & Air Force Exchange Service*, 849 F.2d 199 (5th Cir. 1988). The "substantial evidence" test for review is a narrow one, and the reviewing court is not to substitute its conclusion for those of the agency. Furthermore, the possibility of drawing inconsistent conclusions from the evidence does not mean that the agency's findings are unsupported by substantial evidence. *See Erickson Transport Corp. v. ICC*, 728 F.2d 1057 (8th Cir. 1984).

The Court has reviewed the entire transcript of the hearing before the Board of Inquiry. (Pl.'s Ex. C-1). The Court keeps in mind that in applying this standard of review, it is not to determine whether or not it would have decided the matter in the same manner as the Board of Inquiry but rather whether there is substantial evidence supporting the Board's finding. As the parties noted in their closing arguments, the issue boils down to a question of credibility. The Board of Inquiry had the opportunity to observe the witnesses and to review the

evidence presented, and the Court finds that its decision is supported by "substantial evidence" as that term is used in the statute and in the cases applying that standard of review. Accordingly, the Court also finds that the decision of the Secretary is not arbitrary or capricious or an abuse of the Secretary's discretion.

CONCLUSION

The military's policy regarding homosexuals in the armed forces contained in 10 U.S.C. § 654 and the implementing regulations does not violate plaintiff's rights under the United States Constitution or under the Administrative Procedures Act. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted. The Court will enter a separate order in accordance with this opinion.

DATED this 11th day of December, 1995

BY THE COURT:

/s/
LYLE E. STROM, Senior Judge
United States District Court

APPENDIX D

DEPARTMENT OF THE AIR FORCE
[SEAL] WASHINGTON DC [SEAL]
Office of the Assistant Secretary

28 AUG 1995

ACTION
of the
SECRETARY OF THE AIR FORCE

The Secretary of the Air Force orders that Captain Richard F. Richenberg, Jr., 457-23-6070FR, be removed from active duty in the United States Air Force pursuant to Air Force Regulation 86-12, paragraph 3-14, and that he be issued an Honorable Discharge Certificate.

Approval of this action does not excuse any indebtedness to the United States Government.

/s/
JOE G. LINEBERGER
Deputy for
Air Force Review Boards

APPENDIX E

DEPARTMENT OF THE AIR FORCE
[SEAL] WASHINGTON DC [SEAL]
Office of the Assistant Secretary

9 MAR 1995

MEMORANDUM FOR THE SECRETARY OF THE AIR FORCE

THRU: SAF/US /s/ R 8-11-95
SAF/MI /s/ 8/9/95
SAF/GC /s/ See attached & rec memo 28 Jul 95

FROM: SAF/MIB
1585 Command Drive Suite C-802
Andrews AFB MD 20831-7002

SUBJECT AFR 36-2 Board of Inquiry (Homosexuality) – Captain Richard F. Richenberg, Jr., 457-23-6070FR

Respondent is a 37-year-old EC-135 electronic warfare officer at Offutt Air Force Base, Nebraska. He received his commission through OTS in 1985 and has served continuously on active duty since that time. His OPRs reflect excellent duty performance.

The facts leading to this discharge action are set forth in the HQ USAF/JAG legal review (Attachment 2), which is incorporated by reference. Nonetheless, to facilitate review of this case, a summary of the pertinent facts and circumstances follows.

Respondent's Air Force career was progressing well until 1992, when he was selected to be part of a Foreign Military Sales (FMS) program to train and support personnel in Saudi Arabia. Respondent determined he did

not want to serve a two year tour in Saudi Arabia. In April 1993, near the end of the FMS program training, respondent asked to terminate the PCS to Saudi Arabia and requested separation from the Air Force. The request was denied. A month later, respondent sent a faxed statement to his commander stating he was a homosexual. Between May and September 1993, respondent also told Captain Y that he was a homosexual. Finally, sometime during September 1993, respondent told Captain F that he was a homosexual.

As a result of these statements by respondent, his commander initiated discharge for homosexuality. A Board of Inquiry (BOI) in December 1993 recommended respondent be discharged from the Air Force with a general discharge. Before final action on that recommendation, the Secretary directed the case be reconsidered under the new homosexual policy implemented in 1994. Discharge action was reinitiated in April 1994. Respondent elected to have his case heard at a BOI and the hearing took place on June 20 and 21, 1994.

During the BOI the government's documentary evidence included the letter respondent faxed to his commander stating he was a homosexual. Also included was an affidavit from Captain F in which he acknowledged respondent said he was a homosexual. The government's only witness was respondent's commander, who testified about the faxed letter in May 1993 and respondent's duty performance.

Respondent submitted extensive documentary evidence and called four witnesses at the BOI. Three of the

witnesses stated respondent had admitted his homosexuality to them. All four spoke highly of respondent's professionalism and duty performance. Respondent himself testified about how he came to recognize his homosexuality and that he had self-control over his actions. He said he did not intend to engage in prohibited conduct. On cross-examination, he acknowledged he was attracted to men, but had not yet explored such relationships.

After instructions and deliberations, the BOI found respondent made the three statements alleged and did have a propensity to engage in or intent to engage in homosexual acts. The BOI recommended an honorable discharge. After receiving a copy of the BOI record, respondent submitted a rebuttal on August 3, 1994. The post-BOI comments largely reiterated arguments made at the BOI. Respondent argued he rebutted the presumption that he has a propensity to engage in or intends to engage in homosexual acts. Furthermore, he contended the Air Force homosexual policy is unconstitutional and he should have been allowed to challenge that policy at the BOI. The Vice Commander, ACC, reviewed the BOI proceedings and recommended separating respondent with an honorable discharge.

The Air Force Board of Review considered this case on February 24, 1995. In the Board's view, the HQ USAF/JAG analysis was on target. Even though he now denies any intention to commit homosexual acts, his admission to several people that he had a homosexual orientation seems to belie that contention. In view of the fact that he has come to accept his homosexuality, he continues to be attracted to men, and his testimony that he has not *yet* explored a sexual relationship with another man, the

Board was satisfied that he had not rebutted the presumption that he has a propensity to commit homosexual acts. Accordingly, the Board determined the evidence supported the findings of the BOI and that respondent should be separated from the Air Force with an honorable discharge.

With your concurrence, we will release the attached directive which implements the decision of the Board.

/s/
JOE G. LINEBERGER
Deputy for
Air Force Review Boards

Attachments:
1. Secretarial Instrument
2. HQ USAF/JAG Legal Review
3. Record of Proceedings
4. Case File

/s/ SEW Concur AUG 23 1995
_____ Non concur
_____ See me

APPENDIX F

Record of Proceedings

AIR FORCE BOARD OF REVIEW

Pursuant to Air Force Regulation 36-2, the Air Force Board of Review met at Washington, D.C. on February 24, 1995, to consider the case of Captain Richard F. Richenberg, Jr., 457-23-6070FR.

Special Order AA-335 dated January 5, 1995, appointing the members of the Board, was introduced in evidence as Exhibit 1.

PRESENT

Colonel T. L. Murtaugh
Colonel David L. Oles
Colonel Darvin K. Suter
Colonel Donald H. Ankov
Colonel James W. Shumard, III

RECORDER

Lieutenant Colonel Dartt J. Demaree

The Recorder presented to the Board all available records in connection with these proceedings.

DETERMINATION

That respondent should not be retained on active duty.

RECOMMENDATIONS

That Captain Richard F. Richenberg, Jr., 457-23-6070FR, be removed from active duty in the United States Air Force pursuant to Air Force Regulation 36-12, paragraph 3-14

and that he be issued an Honorable Discharge Certificate from the United States Air Force.

/s/
T. L. MURTAUGH, Colonel, USAF
President

/s/
DARTT J. DEMAREE, Lieutenant Colonel, USAF
Recorder

APPENDIX G

Captain Richard F. Richenberg, Jr. SSN 457-23-6070FR	)))	AFR 36-2 Board of Inquiry Findings and Recommendations

RECOMMENDATIONS OF THE BOARD OF INQUIRY

This Board, after carefully considering all the evidence in this case, has, in closed session, by secret written ballot, a majority of the voting members concurring, by the preponderance of the evidence, made the following findings and recommendations:

FINDINGS

a. The Respondent, Captain Richard F. Richenberg, Jr.:

(1) (Did) (~~Did not~~) make a verbal statement that he is a homosexual as follows:

On or about 24 May 1993, he stated in a letter submitted by telephonic facsimile to Captain Ralph Ah Sam, for him to provide to Captain Richenberg's unit commander, Lieutenant Colonel David G. Bell, that he is a homosexual.

(2) (Did) (~~Did not~~) make a verbal statement that he is a homosexual as follows:

Sometime between 24 May 1993 and 30 September 1993, he verbally stated to Captain Kenneth L. Yaphe that he is a homosexual.

(3) (Did) (~~Did not~~) make a verbal statement that he is a homosexual as follows:

Sometime during September 1993, he verbally stated to Captain Mark L. Feingold that he is a homosexual.

NOTE: If you find that the respondent did *not* make a statement that he is homosexual, you must go to the Recommendations portion and recommend that he be retained. If you find that the Respondent did state he is a homosexual, you must make further findings in Part b below.

b. The Board finds the Respondent (~~does not~~) (does) ~~engage in, attempt to engage in,~~ have a propensity to engage in, or intend to engage in homosexual acts.

NOTE: If you find the Respondent does *not* engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts, you must go to the Recommendations section and recommend the Respondent be retained. If you find the Respondent does engage in, attempt to engage in, has a propensity to engage in, or intend to engage in homosexual acts, you must go to the Recommendations section and recommend that the Respondent be removed and determine the characterization of the discharge.

RECOMMENDATIONS

(NOTE: Circle the paragraph that is applicable to your findings.)

1. Recommend the Respondent be retained in the Air Force.

(2.) Recommend the Respondent be removed from active duty with a (honorable) (~~general under honorable conditions~~) discharge.

The undersigned certify that a majority of the voting members concur in the above findings and recommendation.

/s/	21 June 94
Colonel Billy F. Richey	Date
/s/	21 June 94
Colonel Timothy J. McGoldrick	Date
/s/	21 June 94
Colonel David T. Buckwalter	Date

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4181NEO

Richard F. Richenberg, Jr.,	*	Order Denying Petition
	*	for Rehearing and
Appellant,	*	Suggestion for Rehearing
vs.	*	En Banc
	*	
William J. Perry, etc., et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, Judge Beam, Judge Morris Sheppard Arnold, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Hansen took no part in the consideration or decision of this case.

January 17, 1997

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX I

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

APPENDIX J

NATIONAL DEFENSE AUTHORIZATION ACT OF 1994

10 U.S.C. § 654. Policy concerning homosexuality in the armed forces.

(a) FINDINGS. – Congress makes the following findings:

(1) Section 8 of Article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that –

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed

forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) POLICY. – A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that –

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur; such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) ENTRY STANDARDS AND DOCUMENTS. – (1) The Secretary of Defense shall ensure that the standards for

enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) REQUIRED BRIEFINGS. – The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) RULE OF CONSTRUCTION. – Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that –

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) DEFINITIONS. – In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means –

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(Added Pub. L. 103-160, div. A, title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670).

* * *

IMPLEMENTATION OF SECTION; REGULATIONS; SAVINGS PROVISION; SENSE OF CONGRESS

Section 571(b)-(d) of Pub. L. 103-160 provides that:

"(b) REGULATIONS. – Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

"(c) SAVINGS PROVISION. – Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted

before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

"(d) SENSE OF CONGRESS. – It is the sense of Congress that –

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice)."

APPENDIX K

Department of Defense
DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers:

References: (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)

(b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code

(c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980

(d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992

(e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"

(f) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)

2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.

3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2. Applies to regular commissioned officers of the Military Services.

3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provisions of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. The provisions of Enclosure 6 do not apply to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD (P&R)), in coordination with the Secretaries of the Military Department, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The *Assistant Secretary of Defense for Personnel and Readiness* shall supplement this Directive, as needed.

2. The *Secretaries of the Military Departments* shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

[3]

b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied

consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action.

c. Address any recommendations for policy changes in this Directive to the ASD (P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 28, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 28, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

/s/
Les Aspin

Enclosures – 8
1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers

4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

[ENCLOSURE 1]

[1-1]

DEFINITIONS

1. *Active Commissioned Service.* Service on active duty as a commissioned officer in a grade above warrant officer. W-4.

2. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. *Commissioned Officer.* An officer of any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.

4. *Convening Authority.* The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.

5. *Counsel.* A lawyer qualified under 10 U.S.C. 827(b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.

6. *Drug Abuse.* As defined in DoD Directive 1010.4 (reference (c)).

7. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

8. *Homosexual Act*

a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and

b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.

9. *Homosexual Conduct.* A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

10. *Legal Advisor.* A judge advocate qualified under 10 U.S.C. 827(b)(1) (reference b)) and appointed to assist a Board of Inquiry.

11. *Nonprobationary Commissioned Officer.* A commissioned officer other that [sic] a probationary commissioned officer.

12. *Probationary Commissioned Officer.* A Commissioned officer with less that [sic] 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period

of 3 years from the date of his or her appointment as a regular commissioned officer.

13. *Propensity*. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

14. *Respondent*. A commissioned officer required to show cause for retention on active duty.

15. *Separation*. Discharge, retirement, or resignation.

[1-2]

16. *Sexual Orientation*. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

17. *Show-Cause Authority*. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case [sic] for retention on active duty.

18. *Statement that a Member Is a Homosexual or Bisexual or Words to That Effect*. Language or behavior that a reasonable person would believe was intended to convey

the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[ENCLOSURE 2]

[2-1]

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.

2. Efficiency.

3. Leadership.

4. Lack of response to training, in that performance of duties in the officer's assigned specialty is precluded or impaired to the degree of being unsatisfactory.

5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or

she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.

2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.

3. Drug abuse.

4. Intentional neglect of, or failure to perform, assigned duties or complete required training.

5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.

6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and

private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1.

[2-2]

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts

to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

[2-3]

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving throughout the proceedings, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b. of this enclosure, above.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in Sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

[ENCLOSURE 3]

[3-1]

PROCEEDINGS FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention of active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. *Composition*. See enclosure 4.

2. *Convening*. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. *Function*. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

[3-2]

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Security of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. *Determinations*

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. *Composition.* See enclosure 4.

2. *Convening.* A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. *Function.* After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. *Determinations*

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.

2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. *Retirement.* A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. *Discharge.* A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned

but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.

2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely

because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

[3-4]

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

[ENCLOSURE 4]

[4-1]

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed in section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

[ENCLOSURE 5]

[5-1]

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed to a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. [sic] The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

[5-2]

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or

unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS.

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) of the Secretary of the

Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

[ENCLOSURE 6]

[6-1]

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.

2. That he or she may tender a resignation.

3. That he or she may submit a rebuttal or declination statement instead of a resignation.

4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is

recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.

2. Discharge.

The action of the Secretary is final.

[ENCLOSURE 7]

[7-1]

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. *Consideration.* The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. *Exceptions*

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

(1) By using force, coercion, or intimidation.

(2) With a person under 16 years of age.

(3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.

(4) Openly in public view.

(5) For compensation.

(6) Aboard a military vessel or aircraft.

(7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or moral [sic] comparable to the impact of such activity aboard a vessel or aircraft.

[ENCLOSURE 8]

[8-1]

GUIDELINES FOR FACT-FINDING INQUIRES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiated fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

5. The guidelines in this enclosure do not apply to activities of Defense Criminal Investigative Organizations and other DoD law enforcement organizations, which are governed DoD Instruction 5505.8 (reference (f)).

B. DEFINITIONS

1. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. *Commander.* A commissioned or warrant officer who, by virtue of rank and assignment, exercise primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. *Homosexual Conduct.* "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, handholding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (2) [sic] language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

[8-2]

d. "Propensity to engage in homosexual act" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

5. *Sexual Orientation.* An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

C. BASES FOR CONDUCTING INQUIRIES

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

2. A basis for discharge exists if:

a. The member has engaged in a homosexual act.

b. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

c. The member has married or attempted to marry a person of the same sex.

3. Credible information does not exist, for example, when:

a. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or

b. The only information is the opinions of others that a member is homosexual; or

c. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

d. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when:

a. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

b. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

c. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[8-3]

E. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent

disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does not provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is homosexual or bisexual creates a rebuttable presumption

that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

E. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.

Supreme Court, U.S.
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(2)

No. 96-1648

In the Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD F. RICHENBERG, JR., PETITIONER

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

19 pp

QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of a service member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioner's discharge under it are consistent with the equal protection component of the Fifth Amendment's Due Process Clause, the First Amendment, the Bill of Attainder Clause, and the Administrative Procedure Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 97 F.3d 256. The opinion of the district court (Pet. App. 24-51) is reported at 909 F. Supp. 1303.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on January 17, 1997. Pet. App. 62. The petition for a writ of certiorari was filed on April 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654 (Pet. App. 65-71), is discussed in detail in our brief in opposition in *Thomasson* v. *Perry*, No. 96-1, in which this Court denied certiorari on October 21, 1996. 117 S. Ct. 358.[1] Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to

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[1] We have furnished counsel for petitioner with copies of our briefs in opposition in *Thomasson* and in *Selland* v. *Cohen*, cert. denied, 117 S. Ct. 1691 (1997) (No. 96-1238), which involved similar issues.

marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[2]

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30 (Dec. 21, 1993) (Pet. App. 72-106), applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30 Enc. 2, ¶ C.1.b; Pet. App. 83. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 Enc. 1, ¶ 13; Pet.

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[2] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

App. 79 (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. 1332.30 Enc. 1, ¶ 16; Pet. App. 79)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30 Enc. 2, ¶ C; Pet. App. 81-82.[3] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." DoD Dir. 1332.30 Enc. 2, ¶ C; Pet. App. 81. The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30 Enc. 2, ¶ C.1.b; Pet. App. 83-84.

3. Petitioner, then a captain in the Air Force, applied for separation from the Air Force. Pet. App. 6. Because he was nearing completion of a training program for an assignment to Saudi Arabia, the Air Force denied his request. *Ibid.* Petitioner then informed his commanding officer that he is homosexual, adding that he realized that by making that statement, he was "forcing [his commander] to take actions which may ultimately result in my discharge." *Id.* at 6-7. The Air Force then initiated a discharge proceeding against petitioner under the military's former regulatory policy regarding homo-

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[3] "Homosexual conduct" is defined by the directive as "[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30 Enc. 1, ¶ 9; Pet. App. 78.

sexual conduct in the military. *Id.* at 7, 29. A board of inquiry recommended that petitioner be given a general discharge, but before the Air Force took final action on that recommendation, 10 U.S.C. 654 and its implementing directives superseded the former policy. *Id.* at 7, 29, 54. The Secretary of the Air Force directed that petitioner and the only other similarly situated Air Force service member be reprocessed under the new policy. *Ibid.*; C.A. App. 436, 618.

A second board of inquiry then conducted a new hearing. Pet. App. 7, 29-30. At that hearing, petitioner acknowledged his prior statements but testified that he had not engaged in any "prohibited conduct" in the past and that he would not do so in the future. *Id.* at 30. He also testified about his physical attraction to men. C.A. App. 302-305. Based upon the totality of the evidence, the board found that petitioner had stated that he is a homosexual and that he had a propensity or intent to engage in homosexual acts. Pet. App. 59-60. The board recommended that petitioner be honorably discharged. *Id.* at 60. That recommendation was reviewed and approved, and petitioner was then ordered to be honorably discharged. *Id.* at 52-58.

4. Before that order became effective, petitioner brought this action in the district court seeking to enjoin his discharge. Pet. App. 30. The district court granted petitioner a temporary restraining order, but later entered summary judgment for the government. *Id.* at 23-51. It held that 10 U.S.C. 654 and its implementing directive did not violate petitioner's rights under the Constitution or the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 51.

The Eighth Circuit denied petitioner's motion to stay his discharge, *Richenberg* v. *Perry*, 73 F.3d 172 (8th Cir. 1995), and he was then discharged. Pet. 12. After briefing and argument on the merits, the court of appeals affirmed. Pet. App. 1-22. It held that 10 U.S.C. 654, its implementing directive, and petitioner's discharge did not violate the Fifth Amendment's Due Process Clause, its equal protection component, the First Amendment, the Bill of Attainder Clause, or the APA. *Ibid.*

Chief Judge Arnold dissented. Pet. App. 17-22. He expressed no view on the constitutional issues (*id.* at 19 n.9, 22), but he would have set aside petitioner's discharge on the ground that a *de novo* review of the record led him to conclude that petitioner had rebutted the presumption that he had engaged in homosexual acts or had a propensity to do so. *Id.* at 19-22. The court of appeals denied petitioner's suggestion of rehearing en banc by an equally divided court. *Id.* at 62.

ARGUMENT

The decision below is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military. See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 117 S. Ct. 1691 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996) (sustaining Act against First Amendment challenge and remanding for consideration of prohibition of homosexual acts); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining Act's prohibition

of homosexual acts).[4] This Court recently denied certiorari in two of those cases, both of which involved equal protection, First Amendment, and APA issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result here. While those prior cases did not involve a claim under the Bill of Attainder Clause, that claim is unique to petitioner and without merit. Accordingly, further review is not warranted.

1. The court below correctly rejected petitioner's argument (Pet. 16-20) that 10 U.S.C. 654 and its implementing directives violate equal protection. The court of appeals first held that the statutory policy classifies on the basis of homosexual acts and the propensity to engage in such acts, not on the basis of sexual orientation or status. Pet. App. 10. The court below joined the other courts of appeals that have uniformly held that the rational-basis test applies (*id.* at 8-9), rejecting petitioner's argument (Pet. 23-24) for heightened scrutiny. The court of appeals then held that, given the special circumstances of military service, the armed forces may validly exclude those who engage in homosexual acts. Pet. App. 11. Petitioner does not challenge that holding. Further, the court below properly sustained the judgment of the Legislative and Executive Branches and of military officials that service members "with a propensity or

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[4] Two other cases challenging the "statements" portion of the Act are now pending before the Ninth Circuit. *Watson* v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (9th Cir.) (argued July 8, 1996); *Holmes* v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (9th Cir.) (argued July 8, 1996).

intent to engage in homosexual acts" should also be excluded as a means of fostering the legitimate aims of maintaining unit cohesion, protecting privacy interests, and minimizing sexual tensions. *Id.* at 12. Given those rational and legitimate aims, the court below correctly rejected (*id.* at 10-12) petitioner's argument that the Act is impermissibly "based on invidious or irrational prejudice." Pet. 16. The Fourth and Ninth Circuits have also rejected that argument. *Thomasson* v. *Perry*, 80 F.3d at 927-931; *Philips* v. *Perry*, 106 F.3d at 1429.[5]

Contrary to petitioner's argument (Pet. 17-18), *Romer* v. *Evans*, 116 S. Ct. 1620 (1996), does not cast doubt on the validity of 10 U.S.C. 654, because there are at least four important distinctions between Colorado's Amendment 2 in *Romer* and the Act of Congress challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"—so much so as to "deem a class of persons a stranger to its laws." 116 S. Ct. at 1625, 1627, 1628, 1629. Second, *Romer* arose

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[5] Relying upon the express language of the Act and directive, the court of appeals (Pet. App. 13-14) also correctly rejected petitioner's argument (Pet. 25) that the presumption is effectively irrebuttable. See also *Thorne* v. *Department of Defense*, 945 F. Supp. 924, 927-929 (E.D. Va. 1996), appeal pending, No. 97-1121 (4th Cir.) (reviewing cases of eight service members who successfully rebutted the presumption and were retained in the military).

in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (sustaining men-only draft law). Third, Colorado's Amendment 2 classified on the basis of homosexual status (116 S. Ct. at 1629), whereas the Act of Congress at issue here classifies on the basis of past or likely future prohibited homosexual acts (Pet. App. 10-11). Fourth, the Act of Congress challenged here serves legitimate objectives in the military of prohibiting homosexual acts, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions (*id.* at 11-12), whereas this Court found that Amendment 2 had no legitimate objective. 116 S. Ct. at 1629.

Petitioner also argues (Pet. 19-20) that the policy embodied in the Act and directives is irrational because it presumes that declared homosexuals have a propensity to engage in prohibited homosexual acts, but makes no similar presumption that undeclared homosexuals will. The basic distinction in the policy, however, is not between declared and undeclared homosexuals, but rather between (a) those service members who manifest a propensity to engage in homosexual acts by their acts, statements, or marriage to a member of the same sex, and (b) those who do not. See 10 U.S.C. 654(b). As discussed above (pp. 3-4, *supra*), a person who declares that he is homosexual can be retained if he rebuts the presumption of a propensity to engage in homosexual acts. Moreover, Congress could reasonably conclude that, in contrast to a service member who keeps his sexuality confidential, a member who declares that he is a homo-

sexual voluntarily removes his sexuality from the realm of the purely private and personal and provides a reasonable basis for the military to presume, subject to rebuttal, that he engages in, or will likely engage in, homosexual acts. See Pet. App. 12-13. In any event, even if declared and undeclared homosexuals had equal propensities to engage in homosexual acts, Congress could reasonably decide not to question or investigate all service members about their sexuality, but instead to reserve separation proceedings for those individuals who actually state their homosexuality. See *Wayte* v. *United States*, 470 U.S. 598 (1985).[6]

2. The court of appeals also correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. Pet. App. 14-15. As the court below recognized (*id.* at 14), the Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "who engages

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[6] Petitioner argues (Pet. 20) that the policy is irrational because the directive provides that no action will be taken against a member for "going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes." DoD Dir. 1332.30 Enc 8, ¶ C.3.d; Pet App. 104. Heterosexuals may also engage in those activities for a variety of reasons, however, so those activities do not provide as strong a basis for presuming homosexual acts as does a member's statement that he is a homosexual. See *Steffan* v. *Perry*, 41 F.3d 677, 690 (D.C. Cir. 1994) (en banc). Far from showing irrationality, this provision demonstrates that the Act and regulations are "carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." S. Rep. No. 112, 103d Cong., 1st Sess. 274 (1993).

in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(f)(1). The First Amendment does not prohibit such evidentiary use of a member's statement. *Thomasson* v. *Perry*, 80 F.3d at 931-934; *Able* v. *United States*, 88 F.3d at 1292-1300; *Philips* v. *Perry*, 106 F.3d at 1429-1430. See *Wayte* v. *United States*, 470 U.S. 598 (1985). In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act at issue (see 10 U.S.C. 654(a)) show that that test is met here.

3. Petitioner contends (Pet. 24-25) that the application of the current Act to him based upon a statement that he made before the Act became effective violates the Bill of Attainder Clause, Art. I, § 9, Cl. 3, and the APA. This transition issue is unique to petitioner's case, and thus it would not warrant plenary review in any event. His claim is also without merit.

Petitioner's discharge proceeding was initiated under the former policy, and the first board of inquiry recommended that petitioner be given a general discharge. Pet. App. 54. While that recommendation was under review, the current Act became effective. *Id.* at 7. Although the Act's savings provision (10 U.S.C. 654 note; Pet. App. 70-71) did not require such action, the Secretary of the Air Force directed that petitioner and the only other similarly situated individual be given the benefit of being reprocessed under the new policy. C.A. App. 436, 618. As a result, petitioner received an honorable discharge instead of the less favorable general discharge.

While the current policy differs from the former one in some respects, the standards for discharge are substantially similar; and to the extent there is any difference, the current policy is more favorable to service members because it expressly provides that sexual orientation *per se* is not a ground for discharge and that the presumption of homosexual acts arising from a statement of homosexuality can be rebutted. See *Able* v. *United States*, 88 F.3d at 1286-1287. Indeed, petitioner acknowledged in his initial statement declaring that he is a homosexual that he was "forcing [his commander] to take actions which may ultimately result in [his] discharge." Pet. App. 6-7. Thus, applying the new Act to petitioner's then-pending case did not have a prohibited retroactive effect because it did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994); see also *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, No. 95-1340 (June 16, 1997), slip op. 6-9.

Moreover, the Bill of Attainder Clause is implicated only when a person is punished. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). An administrative separation from the military—and specifically an honorable discharge pursuant to the policy regarding homosexual conduct—is not punishment. *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1225 n.1 (10th Cir. 1984). Thus, affording petitioner the benefit of being reprocessed under the current policy did not violate the Bill of Attainder Clause or the APA.

4. Finally, petitioner argues (Pet. 25-26) that the Air Force board erred in finding that he had not rebutted the presumption, arising from his statement that he is a homosexual, that he has a propensity to engage in homosexual acts. That fact-bound determination, which both lower courts have sustained, does not warrant review by this Court. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

In any event, that finding is amply supported. At the hearing, petitioner testified that he had not committed what he called "prohibited acts" in the past and that he would not commit them in the future. C.A. App. 297, 303. He testified on cross-examination, however, that he was attracted to men and found them physically attractive. *Id.* at 302, 305. When asked whether he would not be opposed to homosexual sex with "the right person," he replied, "I can't say that I've entirely accepted that yet." *Id.* at 304. Thus, as the district court recognized, the issue of whether or not petitioner rebutted the presumption "boils down to a question of credibility." Pet. App. 50. The task of resolving conflicts in the evidence at an agency hearing is normally the duty of the agency, not the court. *Richardson* v. *Perales*, 402 U.S. 389, 399-401 (1971).[7]

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[7] The substantial-evidence test applies to review of the military board's decision. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). But cf. Pet. App. 15-16 n.8. Even the independent-review doctrine of *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 498-511 (1984), however, upon which the dissenting judge below relied (Pet. App. 19), permits due regard for the fact-finder's "opportunity to observe the demeanor of the witnesses." 466 U.S. at 499-500.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

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